Supreme Court U. S.
FILED
JUN 28 1974
MICHAEL [illegible], JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-898

NORVAL GOSS, ET AL., *Appellants,*

v.

EILEEN LOPEZ, ET AL., *Appellees.*

On Appeal from the United States District Court for the Southern District of Ohio

BRIEF AMICI CURIAE

For the Children's Defense Fund of the Washington Research Project, Inc. and the American Friends Service Committee.

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BRIEF AMICI CURIAE

For the Children's Defense Fund of the Washington Research Project, Inc. and the American Friends Service Committee.

INTRODUCTION

We present this brief in support of the Appellees with the consent of counsel for both the Appellants and the Appellees.

We rely on the Appellees' treatment of this Court's jurisdiction and of the constitutional and statutory provisions involved.

The opinion of the District Court, in this case, is now reported as *Lopez* v. *Williams*, 372 F.Supp. 1279 (S.D. Ohio 1973).

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment requires public school officials, who "suspend" students as punishment for alleged misconduct, to provide an opportunity for a fair hearing to determine the truth of the allegations on which the "suspension" is based?

INTEREST OF AMICI

The Children's Defense Fund was established in 1972 as part of the Washington Research Project, Inc. It is committed to achieving systematic reforms on behalf of the Nation's children. During the last year, it has conducted a major study of the exclusion of children from public schools. Its staff, and staff of the American Friends Service Committee, visited over 8,000 households to determine how many children are out of school and why; it has discovered that millions of children are now not in school and that a major reason is the extraordinarily frequent and casual use of disciplinary "suspensions" by school officials. The Children's Defense Fund has concluded, therefore, that the massive problem of children out of school will not be solved until the "suspension" process in America's schools is corrected to screen out countless arbitrary "suspensions" and to ensure fair treatment of its victims. In the late Summer of 1974, the Children's Defense Fund will publish the findings and conclusions of its study in a book to be entitled *Children Out of School in America*.

The American Friends Service Committee has, since 1917, engaged in religious, charitable, social, philanthropic and relief work on behalf of the several branches and divisions of the Religious Society of Friends in America. The American Friends Service Committee, though it cannot speak for all Friends, has a vital interest in this litigation because of Friends' belief in the equality of all human beings in the sight of God. This testimony has led the American Friends Service Committee to commit a significant portion of its resources to deal with those aspects of our social order which result in exclusion and denial of rights. Major attention has been given for the last two decades to aspects of school systems which diminish the opportunity of any student to acquire adequate education. Specifically, our Southeastern Public Education Program is directly concerned with the suspension of students from school. We work with students, parents, teachers and school administrators in the matter. We have carried out investigatory work on the subject of suspensions and have developed materials to broaden citizen understanding of the critical issues involved.

STATEMENT OF THE CASE

This is a class action. The Appellees are nine children and nine parents. They represent a class of thousands of children: children "suspended" from the public schools of Columbus, Ohio between February 1971 and August 1973.

The children suffered the most serious type of deprivation that a public school system can impose. They were deprived of schooling. An official believed that they had done some misdeed; he ordered them to get

out of school; he ordered them to stay out for up to two weeks. School classes went on without them; the schools did not allow them to continue their studies; the schools did not permit them to make up what they missed; the schools took no responsibility for them while away. This, in current jargon, was a "suspension".

The crux of this case is not *that* the children were "suspended". It is *how* they were "suspended". They were denied any opportunity—before, during, or after "suspension"—to persuade anyone that their removal from school was mistaken.

A.

The power of Ohio public school officials to throw children out of school is set forth in Section 3313.66 of the Ohio Revised Code. It empowers them to act in two ways: (1) a school superintendent or executive may "expel" a child for an indefinite period not to extend beyond the current semester; or (2) a school superintendent, executive or principal may "suspend a pupil from school for not more than ten [school] days." There is a notice provision. It applies to both "expulsion" and "suspension". When a child is "expelled" or "suspended", school officials must provide notice "in writing of such expulsion or suspension including the reasons therefor" within twenty-four hours. The Code, however, distinguishes between "expulsion" and "suspension" when it comes to a hearing. When a child is "expelled", he or his parent is entitled to a hearing—not a prior hearing, not a prompt hearing, but an eventual hearing—before the Board of Education. But, when a child is "suspended", there is to be no hearing at all.

The Code, therefore, grants virtually unqualified "suspension" power to school officials: An official may wait until he has already thrown out a child to give a reason. Even then, he need not listen to any suggestion that he was mistaken about the facts, or that "suspension" should not apply in the particular case.

The statute, by the same token, leaves "suspended" children and their parents helpless: They are allowed no opportunity to be heard, by anyone, at any time.

B.

Presumably, under State law, local school authorities are free to supplement the procedure (or lack of procedure) set forth in the Code. The school authorities of Columbus, then, had the option to require notice that is prompt and to mandate a hearing that is both prompt and fair.

Yet the Administrative Guide of the Columbus Public Schools does no more than adopt the provisions of the Code. Its Section 1010.04 simply states: "Pupils may be suspended or expelled from school in accordance with the provision of Section 3313.66 of the Revised Code." Thus it, too, empowers school officials to "suspend" children unilaterally, with notice of reasons delayed, and with no hearing addressed to those reasons.

C.

The "suspension" practice of Columbus school officials followed, in the main, the procedure marked out by the State Code and the local Administrative Guide. They did modify it to some extent. "Suspension", however, remained—in practice, as on the statute books—a thoroughly unilateral process.

Evidence, in the record, on "suspension" practice breaks down into three categories: (1) administrative memoranda issued by the Columbus Department of Pupil Personnel, (2) a description of the "usual" process used during the time at issue here, and (3) testimony about the actual process used to "suspend" the Appellees in the Spring of 1971. The particular facts of the Appellees' own "suspensions" are not the only relevant evidence. This is a class action that includes children "suspended" from the Columbus public schools over a two-and-one-half year period. Thus general "suspension" practice, common to the whole class, is of central importance.

(1) In the two-and-one-half years covered by this case, the Columbus Department of Pupil Personnel issued two memoranda on "suspensions". They were addressed to school principals, the officials empowered by the Code to impose "suspensions". They outlined the process that should be used to remove children from the schools.

The first of them, issued in August 1973, advised principals to follow the procedure set forth in the Code and Administrative Guide. It also added two provisions. It advised that, at the time of the "suspension", the principal should notify the child of the "exact reason and the term of the suspension." Also, the memorandum advised that, at some unspecified later time, the principal should "be available for a conference if one is requested by the parent."[1] These two provisions served a narrow purpose.

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[1] The memorandum is quoted in full in the opinion of the District Court. *Lopez* v. *Williams*, 372 F.Supp. 1279, 1282 n. 1 (S.D. Ohio 1973).

The purpose of the provision for prompt notice was to communicate, quickly, the basis for the "suspension". It was to make the principal reveal, quickly, what he thought the child had done. But it left the child still with no chance to answer. It simply facilitated one-way communication.

The purpose of the provision for a post-"suspension" conference was not to open up the basis for the "suspension" to critical examination. The District Court found: "The conference . . . was not a fact-finding hearing, but rehabilitative in nature."[2] At the conference, the only item on the agenda was the child's future program. *See* pages 11-12 below. It was not meant to allow anyone to show that the "suspension" —and the supposed need for "rehabilitation"—rested on a mistake.

When the Department next issued a memorandum, in February 1973, it did not add to these provisions. Rather, it left out one of them. It left out even the provision for a conference between the principal and the parent.[3]

To be sure—only one week before trial of this case—the Department issued a new memorandum. In July 1973, for the first time, it went a bit, though not far, beyond mere one-sided reforms: It advised that, before removing a child from school, a principal should discuss the alleged offense with him; and it provided that if "any suspension is subsequently found to be erroneous, all reference to the suspension shall be expunged

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[2] *Id.* at 1302. *See id.* at 1283.

[3] *Id.* at 1282-1283 n. 1.

from the school's records."[4] But this new memorandum, whatever it might eventually mean in practice, is *irrelevant* here.

The District Court ruled that the class action, at issue here, could not extend to this proposed change in procedure: "Plaintiffs have not engaged in conduct which would subject them to the newly adopted suspension procedures. Thus, they cannot sue on their own behalf or on the behalf of others for relief from the newly adopted suspension procedures. See *Hall* v. *Beals*, 396 U.S. 45, 48-49."[5] Children, after August 1973, might possibly be treated somewhat more fairly; but that hardly affects the validity of "suspensions" before that time or the need for expungement of those "suspensions" from the record.[6]

(2) Thus, during the time span at issue here, the "suspension" process mandated by the Code and the Administrative Guide was preserved basically intact by the central school authorities: There still was to be no hearing of any kind at any time. That left "suspen-

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[4] *Id.* at 1283-1284.

[5] *Id.* at 1296 n. 11. The Appellants do not now challenge the definition of the class by the District Court.

[6] The District Court said: "Defendants argue that the suspension guidelines adopted by the Department of Pupil Personnel on July 10, 1973 moot the constitutional question presented. . . . The new guidelines have no impact upon the constitutional claims of the named plaintiffs or any member of the class they represent who was suspended prior to July 10, 1973. If their suspensions were imposed without due process of law, they have a right to a declaration that the suspension procedure was unconstitutional and to the expunction of any reference to the suspension from all records maintained by the Columbus Public Schools. There is a present, live controversy, and not a moot action. *See*, Golden v. Zwickler, 394 U.S. 103 . . . (1969)." *Id.* at 1296.

sion" procedures, in practice, to individual school principals.

Their power was formidable. The record includes a lengthy deposition of Phillip Fulton, principal of a Columbus high school, describing the "usual" procedure that principals used to "suspend" children. It indicates that, on occasion, principals may have supplemented the official "suspension" process on their own: They sometimes "discussed" the "suspension" with the child before removing him from school, and they sometimes held a "conference" with the parent afterwards. (App. 111-114.) But, in practice, the process remained unilateral.

The permissible grounds for "suspension" were not "spelled out in any single system or document." But the schools did "have school rules." These, along with the "rules and regulations of the Board of Education—State, Federal, City law—could all be areas that could be grounds for suspension." The students were "apprised of school rules" through "school assemblies, announcements on the P.A. system, school handbooks, school bulletins, memos sent to parents, council meetings." (App. 66-67, 105.)

"Suspensions" generally were based on the word of a teacher, alleging that a pupil had committed a rule violation not witnessed by the official with authority to remove the child from school:

> "The majority of times the incident does not occur with an administrator. It occurs in a situation where a teacher refers it to administration."

(App. 112.) Despite the fact that the Code and the Administrative Guide give "suspension" power only

to a principal, it would often be someone other than the principal who would evaluate the teacher's allegations:

> "It would depend upon who was available, who the teacher may refer the incident to. It can be one or the other of the administrators."

(App. 112.) (*See* App. 118.)

At that point, the administrator would often call in the pupil. The administrator, according to Mr. Fulton, would often listen to what the child had to say. But, if the child and the teacher disagreed as to what had happened, *the administrator would automatically believe the teacher:*

> "If there is a large discrepancy where the student would deny [the teacher's version of events] and the teacher would confirm it, then we would react upon this information according to what the teacher tells us."

(App. 112-113.) Any preliminary "discussion" with the pupil was, therefore, *pro forma.* His word was presumed noncredible. The presumption, apparently, was irrebuttable:

> "Q. Now, the procedure that you were describing there is the procedure you used in ordinary situations? I mean, they are used not when the school is going up in flames, but in an ordinary suspension type of situation? A. Right.
>
> Q. Now, you mentioned that if the student contested what the teacher said, the teacher then would be called in, or occasionally the teacher would be called in? A. Right.
>
> Q. What would happen if there was still dispute? A. Then the teacher's word would be the deciding factor."

(App. 113.)

Thus the one-sidedness of the process, inherent in the Ohio Code and the Columbus Administrative Guide, was routine. Even if a child had notice of the reason for his "suspension", even if he had a chance to speak up for himself, he ran up against an irrebuttable presumption that the allegations against him were true. The child might be allowed to speak. But what he said would not be considered. This was not a "hearing":[7] The validity of the "suspension" was, in reality, not open to question at all.

Often, according to Mr. Fulton, a later "conference" would also be held with the child's parent. But it, too, was far from a hearing on the underlying facts of the "suspension". Indeed, those facts were not even discussed. The official version of events was simply assumed to be true:

> "Q. Traditionally, what is discussed at these conferences? A. The problem, the individual, we talk about their school record. We get their entire school record. We talk about their academic problems if they exist. We talk about their potential. We talk about their goals. It is a conference to remedy the problem and you try to find a solution so that the student is successful in his schooling.
>
> "Q. Is it a conference to verify the facts supporting this suspension, or is it more a conference to determine future placement? A. No, because almost always placement is right back where they are. It is to communicate with the parent, as part of my responsibility, the problem that exists and ask for their help. We inform them and then find out what directions we can take that will eliminate the need for further problems."

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[7] *See* page 49 below.

(App. 114.) At the "conference", the allegations against the child, on which the "suspension" was based, were not to be contested; they were not to be questioned; they were not even to be discussed.

(3) The "suspensions" of the Appellees in the Spring of 1971 revealed this process at work. The circumstances were somewhat unusual: circumstances that made mistaken "suspensions" particularly likely and time for prior consideration particularly short. But the "suspension" process was entirely "usual": It was entirely unilateral.

The Appellees' "suspensions" took place during a time of some unrest in Columbus secondary schools following "Black History Week." On occasion, many pupils left their classrooms, and many pupils participated in large (overwhelmingly non-violent) confrontations between blacks and whites. (App. 85-111, 127-128, 131-132, 138-140.) Others did not. The Appellees—who are black—insist that they did not join in the confrontations. (App. 128, 132, 137-139, 149.) Yet they were among the students singled out to be removed from school.

The Appellees' "suspensions" were not identical in every respect. In some cases, a principal thought he had seen them misbehave. In other cases, he relied on the views of other administrators or teachers. (App. 103, 106, 107, 109, 111-112.) Some Appellees were thrown out on the spur of the moment during the school day. (App. 140, 148.) Others were "suspended" only after they, and all other students, had returned home for the day. (App. 128-129, 133.) Some were told what they were alleged to have done. Most were not.

(App. 127, 129, 133, 138, 142, 148-149.) The variations were legion.

But one fact united every case: School officials allowed no Appellee an opportunity, however brief, however informal, to contest allegations that were mistaken and to have their views fairly considered. (App. 129-130, 133, 142, 150.) The record is clear on this point.

Later, the Appellees' parents received short letters informing them of the "suspensions". Some of these letters gave no reason whatever for the "suspensions". Others did. One simply said that the pupil had "disrupted . . . the school program." Another said that the pupil had been "defiant and disrespectful." (App. 48, 53.)

In some cases, the student's parent was asked to come to the school, after the full "suspension" was over, for a conference. But, following usual practice, the conference was not to review the underlying facts of the "suspensions". It was simply to discuss the child's future program. (App. 146-147, 151.) The record reveals *no* instance in which the basis of the "suspension" was ever afterward open to contest—not promptly after the child was sent away, not after the full period of the "suspension", not to this day.

In this manner, the Appellees were deprived of schooling. One of them was kept out of school for one week. (App. 135.) The others were "suspended" for two weeks. One was "suspended" twice, for a total of four weeks. (App. 151.) One, who did not appear with his parents for the later conference, was excluded from school for a longer period—one month. (App. 126,

129-130.) Some were never allowed to return to their school, but were transferred to other schools or night schools. (App. 122, 126, 151.)

The Appellees, then fell victim to the Columbus "suspension" process at an atypical time. But their treatment was entirely typical. They never had a chance to persuade anyone that their "suspensions" were mistaken. Neither did any other Columbus public school pupil, in any circumstances, at this time.

D.

The impact on the Appellees, and their class, of "suspension" from the Columbus public schools was brought out at trial. They were away from school—at home or on the streets—for periods from one week to a month. This was impact enough. The record, however, shows that there were also collateral consequences.

Missing classes for a week, two weeks or a month was academically harmful. The record shows that "suspended" children automatically received "zeros" for every day missed. (App. 147, 153, 165, 184.) But the impact on their grades was only one index. Their learning process was interrupted. (App. 184.) They were often not allowed to take their books away with them. (App. 142.) They were never given a chance to make up the studies that had gone on without them. (App. 123, 136, 143, 152.) The Columbus Director of Pupil Personnel testified that this plainly could have "negative" educational effects. (App. 165-166.)

Those who were eventually transferred to a different school, because of their "suspensions", faced added difficulties. One testified: "I never did catch up fully to what I did miss and the change from one way of

teaching to another made it a little worse than what I had already had." Because of this transfer, he graduated from high school one year later. (App. 125.)

At trial, educational experts and psychologists testified to the emotional harm inflicted by a "suspension"—particularly a "suspension" imposed unilaterally, not giving the student a chance to speak out or understand the basis of his punishment. Being labelled as a "deviant" within the school, they testified, affects the child as a blow to his self-esteem, making him feel "helpless", and often reinforcing or spurring tendencies to misbehave in the future. (App. 155-156, 158-160, 171-176.)

The record also shows a more tangible labelling that resulted from "suspension". The Superintendent of the Columbus Public Schools testified that a child's letter of "suspension" is kept in his permanent file that follows him through the school system. (App. 69.) The file is always open to school personnel. (App. 69.) Thus, as an educational expert testified, "the labelling process . . . does carry over from one teacher to another . . . the teacher expects a certain kind of behavior, namely rebellious behavior or negative behavior, from a youngster and with that kind of expectation as a pre-set the youngster naturally is re-enforced into producing that kind of behavior." (App. 157.)

The child's permanent record, finally, may have other ramifications. It is always available to the police. (App. 79.) And it may be used by teachers writing recommendations to employers or colleges. (App. 69.) Thus the "suspension" label stays with the child in Columbus—well beyond the weeks that he is actually deprived of public schooling.

E.

On the basis of this record, the District Court concluded that the Appellees, and other children "suspended" from the Columbus public schools, from February 1971 to August 1973, were denied Due Process of Law. The Court ordered "that references to the suspensions of plaintiffs or members of their class be removed from all records of the Columbus public schools."[8]

Its holding was limited. It did not declare that every public school must follow one formal procedure in "suspending" children. It recognized room for flexibility in procedure: "The choice of the best procedure for a particular school system should be left to the school officials charged with the administration of that school system." But it denied that procedural discretion is absolute.[9]

Specifically, it held that "suspended" children must be allowed *some* kind of hearing—not a trial-type hearing—"prior to suspension or within a reasonable time thereafter."[10] It noted that immediate removal of a pupil, without a prior hearing, might be essential if the child's conduct is "disrupt[ing] the academic atmosphere of the school, endangers fellow students, teachers or school officials, or damages property."[11] In that case, a later hearing would be appropriate—but "not later than 72 hours after the actual removal of

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[8] *Lopez* v. *Williams*, *supra* note 1, at 1302.

[9] *Id.*

[10] *Id.*

[11] *Id.*

the student from the school."[12] And at the hearing, whether prior or later, the child must, at least, be shown "statements in support of the charges" against him and allowed to offer statements in "defense . . . or in mitigation or explanation of his conduct."[13] The administrator must, then, make a decision based on fair consideration of the opposing statements.

Such a hearing, the District Court said, would simply provide a "minimum" of Due Process. The Columbus public schools did not even provide that.

SUMMARY OF ARGUMENT

This case concerns an administrative process alien to the very concept of Due Process. It is not a summary process. For a hearing is *never* held. Indeed, it is hardly a process at all; it is a system of administrative fiat. It is used to "suspend" children from the public schools.

Once, the operation of the public schools was thought immune from the law and the Constitution. Now, however, the veil has been pierced. It is now known that "suspensions," casual and no doubt arbitrary, are a way of life in the public schools. Over ten years, the lower courts have evolved a body of constitutional law to deal with the problem: they have held that Due Process requires school administrators to allow "suspended" children a hearing. Today, as the issue reaches this Court, the doctrine of procedural due process is sufficiently developed to resolve this case in three clear steps: three steps that inexorably establish

[12] *Id.*

[13] *Id.*

that the school children, here, were denied their right to a fair "suspension" procedure.

First, the Due Process Clause plainly applies to the "suspension" of children from public school. Such action by public school officials is nothing more than ordinary State action; it is directed against "persons" entitled to constitutional protection under the Fourteenth Amendment. It "deprives" them, albeit temporarily, of public schooling, which, in our society, is a basic component of "liberty" and which, in Ohio, is a "property" interest supported by State law and individual school rules.

Second, since the Due Process Clause applies, so does its one most fundamental principle: that no one may be deprived of a protected interest without opportunity for a fair hearing at some time. The public schools of Columbus violated this basic guaranty. This Court has never permitted such a thing. Every procedural due process decision of this Court, therefore, supports a holding that the children of Columbus were denied their right to a fair hearing.

Third, an examination of the realities of school "suspensions"—the risk of arbitrariness, the resulting harm to children, and the interests of school administrators—shows that Due Process is satisfied, in this context, only by opportunity for a fair hearing before "suspension," or, in emergency situations, promptly thereafter.

The holding of the District Court, that the Appellees and their class were "suspended" without Due Process of Law, must be affirmed. Affirmance will not lead this Court down any slippery slope. To the contrary, it will simply establish, once and for all, that school children

may not be *excluded* from public school without at least the minimal fairness that lies at the core of Due Process.

ARGUMENT

I. INTRODUCTION

Some years ago, this lawsuit might never have been filed; if filed, it might have been dismissed out of hand; and, in all likelihood, it would not have any hope to reach the Supreme Court of the United States. Times—and the law—have changed.

Recently, three developments have combined to make the issue raised by this case a pressing one: (1) the problem of school "suspensions" is, at long last, recognized as one of shocking proportions, (2) the lower federal courts have, at last, cut through sterile legalisms surrounding school operations and have evolved a standard for due process in "suspensions", and (3) this Court has sharpened due process doctrine, moving beyond the vague formulae of the past and establishing clearer tests that may now be applied to school "suspensions".

A.

The Problem of School "Suspensions" Is Now Recognized To Be a Problem of Shocking Proportions.

Only a few years ago, school "suspensions" were virtually invisible. The federal government had no idea how many children were "suspended" each year, how they were "suspended", or why. Neither did state governments. Nor local governments. Even school superintendents were often in the dark.[14] For "suspension" was an administrative process so discretion-

[14] The central school authorities of Columbus still are in the dark. *See* page 62 below.

ary and so informal that it was hidden inside the offices of individual principles in indivdual schools throughout America.

An administrative process that operates behind closed doors, beyond the vision of the world, is obviously subject to great abuse.[15] But the abuse remained hidden so long as no one knew how many children it affected. It was assumed, if anyone bothered to think of it, that "suspensions" were confined to a few patently incorrigible troublemakers.

Then, in the fall of 1973, a major effort was undertaken to collect national figures on "suspensions". The Office for Civil Rights of the Department of Health, Education and Welfare (OCR) included questions regarding student "suspensions" in its National School Survey of Public Elementary and Secondary Schools.[16]

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[15] Mr. Justice Frankfurter wrote: "Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. . . . Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring).

[16] The National School Survey of Public Elementary and Secondary Schools is required under Title VI of the Civil Rights Act of 1964 and under Title IX of the Education Amendments of 1972. Two thousand, nine hundred seventeen school districts were surveyed by OCR in the Fall of 1973. These districts account for over 50 percent of the public school enrollment in the country and over 90 percent of the minority enrollment. All school districts eliminating racially or ethnically dual school systems under terms of voluntary plan agreements with OCR or pursuant to Federal court orders were included in the survey, as well as all districts where the enrollments were comprised of ten percent or more minority students and all districts with at least one school where the enrollment was comprised of 50 percent or more minority students.

Local school districts included in the survey were asked to report, by race and by school, the total number of pupils "suspended" at least once during the 1972-1973 school year.[17] Although OCR has not yet completed its final analysis of the data, preliminary analyses show a nationwide pattern of suspensions from school that is truly astounding.

The Director of the O.C.R., appearing before a House of Representatives Subcommittee in May 1974, summarized the findings for "a few of those cities for which the data is most complete." He testified that, during the 1972-1973 school year, the New York City schools "suspended" 19,518 pupils, the Houston schools "suspended" 9,150 pupils, the Miami schools "suspended" 6,812 pupils, the Cleveland schools "suspended" 11,634 pupils, and the Memphis schools "suspended" 9,339 pupils.[18] And these were only pupils "suspended" at least once; many of them were "suspended" more than once during the single school year.

The O.C.R. Director testified, further, that the data suggests a troubling degree of arbitrariness in the "suspension" process. Specifically, the data shows that minority pupils were "suspended" far more often than other pupils. The New York City schools, for example,

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[17] Each district was required to report, by school, on Form OS/CR 102 "the number of pupils suspended at least once from this school campus during the previous school year" and "the total number of suspension days from this school campus during the previous school year."

[18] Statement by Peter E. Holmes, Director, Office for Civil Rights, Department of Health, Education and Welfare, before Subcommittee on Equal Opportunities, Committee on Education and Labor, U.S. House of Representatives, May 21, 1974, at 11-12.

have a 64.4 percent minority enrollment, but 85.9 percent of all pupils "suspended" were from minority groups. This pattern, the O.C.R. Director testified, was in the data for almost all of the major cities analysed.[19]

A review of O.C.R. data from selected states, conducted by the staff of the Children's Defense Fund,[20] shows that the number of children "suspended" from school is surprising not only in absolute terms, but also in proportion to the total number of children in the schools. In each State studied—Arkansas, Maryland, New Jersey, South Carolina and Ohio—tens of thousands of children were "suspended" in the 1972-1973

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[19] *Id.*

[20] The Children's Defense Fund of the Washington Research Project, Inc., reviewed the suspension data in five States in connection with a study it is conducting of children out of school. Staff members of the Children's Defense Fund were interested in determining the extent to which suspensions were being used as a method of discipline, and the extent to which children were being kept out of school because of suspensions. Because OCR had not completed an analysis of the suspension data, the Children's Defense Fund staff, for four of the five States studied, compiled the suspension figures, referred to in the following paragraphs and set forth in Appendix A, from the school-by-school data (Form OS/CR 102) submitted by the districts surveyed by OCR. The suspension data for the South Carolina districts were taken from a chart published by the South Carolina Community Relations Program of the American Friends Service Committee in "Do Unto Others . . . A Report on School Districts' Compliance With South Carolina's 1973 'Student Discipline Law'" *Your Schools*, Special Report, April 1974, pp. 14-16. The figures in that chart were compiled from Form OS/CR 101. The source documents for the suspension data are available at the Office for Civil Rights in the Department of Health, Education and Welfare, 330 Independence Avenue, S.W., Washington, D. C.

school year.[21] Specifically, more than one of every twenty pupils in the schools were "suspended".[22]

But the problem is even more acute. When the focus is turned to junior and senior high schools, the numbers of children "suspended" are amazing. In these schools, "suspensions" were a way of life; about one of every ten secondary school students was "suspended" during the 1972-1973 school year. Minority students, again, were thrown out even more frequently: about one of every seven minority students in secondary school was "suspended".[23]

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[21] The districts in the five States reported "suspending" over 150,000 children in all. The total number "suspended" would far exceed 150,000, if all of the school districts in the five States had been included by OCR in its Fall 1973 Survey. The number of suspensions would also be increased if all of the school districts surveyed had submitted data on suspensions to OCR. Suspension data were available for 397 of the 402 districts surveyed by OCR in the fall of 1973. The largest school district reporting information "not available" on suspensions was Columbus, Ohio.

The 402 districts surveyed by OCR were less that 25 percent of the total number of operating school districts in the five States studied, but they accounted for over 50 percent of the total public school enrollment in these five States. District-by-district breakdowns of the suspension data reported to OCR by each of the districts surveyed are set forth in Tables I-V of Appendix A.

[22] Again, these students were "suspended" *at least* once. In four of the five States studied, students missed over 575,000 school days—the equivalent of 3,200 school years—due to "suspension." (No data on "suspension" days were recorded by the Children's Defense Fund for the school districts in South Carolina.)

[23] Because breakdowns on secondary suspensions were not readily available from OCR, the Children's Defense Fund looked at suspensions from secondary schools in only ten selected districts in the five States studied. However, its review of suspension figures in a number of school districts in other States, which have been examined in connection with its study of children out of school, support these findings.

Indeed, this O.C.R. data actually understates the dimensions of the problem. It identifies children who were "suspended" at least once during the 1972-1973 school year, but gives no indication of the frequency with which individual students were suspended. As part of its nationwide survey of children out of school, the Children's Defense Fund tried to find out more about the "suspended" student. Its staff visited more than 8,000 households in urban census tracts and parts of rural counties.[24] It found that of all the school-age children in these households "suspended" at least once during the 1972-1973 school year, 61% were "suspended" only once. But 39% were "suspended" more than one time during the single year. In fact, 25% were "suspended" three or more times.[25]

Thus, at long last, it is clear that the "suspension" problem really *is* a problem. It is more than that: "Suspension" of children from public school is now a virtual epidemic in America.

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[24] The 8,000 households surveyed were in nine states and the District of Columbia—specifically, parts of Autauga County and Montgomery, Alabama; Denver, Colorado, Hancock County and Macon, Georgia; Davenport, Iowa; Floyd County, Kentucky; Portland, Maine; Cambridge, Holyoke, New Bedford, Somerville and Springfield, Massachusetts; Canton, Mississippi; Columbia and Sumter County, South Carolina; and Washington, D. C. The surveyed areas considered together represent a wide socioeconomic cross-section. Interviewing in these areas took place between July 1973 and March 1974.

[25] A more detailed analysis of the findings of the Children's Defense Fund survey is set forth in Appendix B of this brief.

B.

Dealing With Isolated Cases of "Suspension", the Lower Federal Courts Have Cut Through the Legalisms That Once Shrouded School Operations and Have Developed a Right of Due Process for the "Suspended" Child.

Over the years, "suspensions" have produced many lawsuits in the courts. These lawsuits have revealed what is going on in the public schools: the utter lack of procedural regularity that permits, even encourages, easy and unjustified resort to the sanction of "suspention". But, for years, the courts could not open their eyes to these facts.

Their vision was blocked by a fog of legal doctrine that shrouded the decisions of school administrators to throw out their students. "To support their position, the administrators could draw on a whole grab-bag of conceptualisms: that attendance . . . was a privilege rather than a right; that . . . [the school] stood *in loco parentis* to the student; or that the vague rules . . . that a student could be dismissed whenever the institution thought this advisable, constituted a contract that the student had accepted." Wright, *The Constitution on Campus*, 22 VAND. L. REV. 1027, 1030 (1969). The power of the administrators was absolute, their abuse of it unreviewable. Few questioned this legal orthodoxy.

One who did, Professor Warren Seavey, wrote in 1957: "[O]ur sense of justice should be outraged by denial to students of the normal safeguards. It is shocking that the officials of a state educational institution, which can function properly only if our freedoms are preserved, should not understand the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a

student the protection given to a pickpocket." Seavey, *Dismissal of Students: "Due Process"*, 70 HARV. L. REV. 1406, 1406-1407 (1957). Yet that is what courts did.

At last, in 1961, a court cut through the legalisms shrouding public school operations for the first time. The case involved the "expulsion" of a student from a state college. The court held that "due process requires notice and some opportunity for hearing before a student . . . is expelled for misconduct." *Dixon* v. *Alabama State Board of Education,* 294 F.2d 150, 158 (5th Cir. 1961), *cert. denied,* 368 U.S. 930. The court reasoned that a hearing was required because "a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses." *Id.* at 158-159. It held that the hearing (a) must be before the dismissal, and (b) must involve "the rudiments of an adversary proceeding." *Id.*

At first, other courts were slow to generalize the *Dixon* holding, as they clung to the idea that they "should not usurp" the role of school administrators. *E.g., Madera* v. *Board of Education,* 386 F.2d 778, 784 (2nd Cir. 1967). But, haltingly, *Dixon* was applied to "expulsion" from a public high school, *e.g., Wasson* v. *Trowbridge,* 382 F.2d 807 (2nd Cir. 1967), and then to "suspension" from a state college, *e.g., Esteban* v. *Central Missouri State College,* 277 F.Supp. 649 (W.D. Mo. 1967), and then to "suspension" from a public high school, *e.g., Williams* v. *Dade County School Board,* 441 F.2d 299 (5th Cir. 1971). Ten years after the *Dixon* decision, it was being applied regularly to "suspensions" from public schools.

In the early 1970's, the courts began to apply *Dixon* to "suspensions" of varying severity. Once again, they felt their way slowly, carefully. At first, they required a *prior* hearing for a "suspension" of 40 days, *Williams* v. *Dade County School Board, supra,* and then for a "suspension" of 10 days, *Black Students of North Fort Myers Jr.-Sr. High School* v. *Williams,* 470 F.2d 957 (5th Cir. 1972), but not for a "suspension" of 5 days, *Jackson* v. *Hepinstall,* 328 F.Supp. 1104, 1106 (N.D.N.Y. 1971), or of 3 days, *Tate* v. *Board of Education,* 453 F.2d 975 (8th Cir. 1972). And yet they seemed to assume that *some* kind of hearing should be held even in cases of shorter "suspensions". *E.g., Banks* v. *Board of Public Instruction,* 314 F.Supp. 285, 292 (S.D.Fla. 1970).

Next, the courts recognized that even a "suspension" of a few days could work substantial harm to a child. *E.g., Shanley* v. *Northeast Ind. School District,* 462 F.2d 960 (5th Cir. 1972). One court required a formal, prior hearing for a "suspension" of two days. *Mills* v. *Board of Education,* 384 F.Supp. 866, 878 (D.D.C. 1972). And another observed that "a suspension of even one hour could be quite critical to an individual student if that hour encompassed a final examination that provided for no 'make-up'." *Shanley* v. *Northeast Ind. School District, supra,* at 967 n.4.

Finally, in the last two years, the courts have reached the middle-ground solution that they appeared to have been searching for. They have concluded that a "suspension" of 5 days, *Vail* v. *Board of Education,* 354 F.Supp. 592, 603-604 (D.N.H. 1973), or 10 days, *Black Students of North Fort Myers Jr.-Sr. High School* v. *Williams, supra,* must be preceded by an adversary hearing of the kind contemplated in *Dixon.* For

shorter "suspensions" "full compliance with the requisites outlined in *Dixon* is not required." *Pervis* v. *LaMarque Ind. School District,* 466 F.2d 1054, 1058 (5th Cir. 1972). But "due process requires at least an *informal* administrative consultation with a student before *any* suspension is imposed so that the student can know why he is being disciplined and so that the student can have the opportunity to persuade the school official that the suspension is not justified." *Vail* v. *Board of Education, supra,* at 603.

Thus the law of "suspension" from public school has developed dramatically—although gradually—in the past years. The legal spade work has been done; a vast variety of cases have yielded a coherent doctrine. The time is ripe for decision by this Court.

C.

The Principles of Procedural Due Process Have Now Been Sharply Defined by This Court and May Now Be Applied to the Problem of School "Suspensions".

For years, the law of procedural due process was vague and opaque. "Many controversies," Mr. Justice Jackson said, "have raged about the cryptic and abstract words of the Due Process Clause." *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950). The controversies were due, largely, to the very fact that the Clause was interpreted to be "cryptic and abstract".

So long as due process called only for a vague, unsystematic "weighing" of a shifting multitude of factors, it could be made to allow whatever a judge wanted it to allow. *See Goldberg* v. *Kelly,* 397 U.S. 254, 255-257 (1970) (Black, J., dissenting); *In re Winship,* 397 U.S. 358, 377 (1970) (Black, J., dissenting). Any one fac-

tor could be picked out, emphasized, and given the weight that the desired result required. A relatively novel issue—like school "suspensions"—would be resolved *ad hoc*. Because it would *seem* novel, a judge might start with an intuitive "feeling" that he should not intervene *via* the Due Process Clause. That might have ended the case. For the Clause required no standard any more precise than that very "feeling" of the judge.

Now, that has changed. The Supreme Court in the last twenty years has built "law" into the Due Process of Law. Most notable, of course, was the "incorporation" of Bill of Rights provisions into the Fourteenth Amendment Due Process Clause. *E.g., Gideon* v. *Wainwright,* 372 U.S. 335 (1963). But just as important, if somewhat slower in coming, was the successful effort led initially by Mr. Justice Harlan to construct a stable, independent doctrine of procedural due process. *E.g., Boddie* v. *Connecticut,* 401 U.S. 371 (1971); *Sniadach* v. *Family Finance Corporation,* 395 U.S. 337, 342 (1969) (Harlan, J., concurring); *Fuentes* v. *Shevin,* 407 U.S. 67 (1972); *Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Arnett* v. *Kennedy,* 42 U.S.L.W. 4513, 4532 (1974) (White, J., concurring and dissenting); *Mitchell* v. *W. T. Grant Co.,* 42 U.S.L.W. 4671 (1974); *Astol Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 42 U.S.L.W. 4693 (1974).

Now, an intuitive "feeling" is only the beginning, not the end, of a case. Application of the Due Process Clause still depends on a variety of factors. But those factors are ordered systematically; and they are limited systematically. In some cases, the factors must still be weighed. But they must be weighed system-

atically. A novel issue, such as school "suspensions", is no longer presented in a doctrinal vacuum. There is stable doctrine that must be applied to the issue.

Analysis of a procedural due process issue now requires three distinct steps. (1) It no longer begins with a proclamation that the Due Process Clause is "cryptic and abstract". Instead, the analysis now begins by considering whether a "person" has been "deprived" of an interest in "life, liberty or property". *E.g., Fuentes* v. *Shevin, supra,* at 84-90; *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972); *Board of Regents* v. *Roth, supra,* at 569-578; *Perry* v. *Sindermann,* 408 U.S. 597, 599-604 (1972); *Arnett* v. *Kennedy, supra,* at 4530-4531 (Powell, J., concurring), 4534-4536 (White, J., concurring and dissenting), 4522-4524 (Marshall, J., dissenting). If a case falls within these terms of the Due Process Clause, then the right to procedural due process must be granted.

To determine what that right is, the analysis takes two more steps. (2) Initially, one basic principle must be applied: A person deprived of "life, liberty or property" must be allowed *some* opportunity at *some* time to challenge the basis of the deprivation. *E.g., Boddie* v. *Connecticut, supra,* at 377-378; *Fuentes* v. *Shevin, supra,* at 80-81; *Board of Regents* v. *Roth, supra,* at 569-571; *Arnett* v. *Kennedy, supra,* at 4530 (Powell, J., concurring), 4534 (White, J., concurring and dissenting), 4523 (Marshall, J., dissenting). This opportunity to be heard must be "meaningful", both fair and adequate to bring out the facts that might persuade those in authority to countermand the deprivation. *E.g., Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965); *Goldberg* v. *Kelly, supra,* at 266-271; *Morrissey*

v. *Brewer, supra,* at 484-489; *Arnett* v. *Kennedy, supra,* at 4539-4541 (White, J., concurring and dissenting).

(3) Finally, to determine the timing and form of the hearing required by Due Process, a court must canvass three factors: (a) What is the risk of a mistaken deprivation of "life, liberty or property" under present circumstances? (b) What harm is done to a person by a mistaken deprivation? (c) What effect would requirement of a fair hearing, before the deprivation, have on the governmental program at issue. To what extent would it frustrate the program? To what extent would it promote the goals of the program? Based on this survey, a court can decide what kind of hearing opportunity is required and whether it must be before or after the initial deprivation. *See e.g., Goldberg* v. *Kelly, supra,* at 263-271; *Boddie* v. *Connecticut, supra,* at 378; *Fuentes* v. *Shevin, supra,* at 80-82; *Morrissey* v. *Brewer, supra,* at 477-490; *Board of Regents* v. *Roth, supra,* at 569-570; *Arnett* v. *Kennedy, supra,* at 4531-4532 (Powell, J., concurring), 4536-4541 (White, J., concurring and dissenting), 4524-4528 (Marshall, J., dissenting); *Mitchell* v. *W. T. Grant Co., supra; Astol Calero-Toledo* v. *Pearson Yacht Leasing Co., supra.*

There *is* a doctrine of procedural due process. This case, then, is not a "school case". Rather, it is a procedural due process case. And, when the law of procedural due process is applied, this becomes not a hard case, but an easy one.

II. THE DUE PROCESS CLAUSE APPLIES

The elementary issue is whether the "suspension" of children from public school falls within the terms of the Due Process Clause: whether the children are entitled to any due process protection at all. It is the

most hotly contested issue in the case. It cuts to the heart of the court decisions, since 1961, that have protected a child's interest in schooling with the due process guaranty. The question is whether the fog of conceptualisms that once shrouded the public schools should be permitted to descend once again.

A.

Public School Action Is Ordinary "State Action".

The Fourteenth Amendment applies to State action. The public schools are run by the State. But, at one time, it was thought that school administrators were somewhat special, not just State agents, but quasi-parents. If they were subject to the Constitution at all in dealing with pupils, it was thought to be a wholly permissive Constitution. See Wright, *The Constitution on Campus,* 22 VAND. L. REV. 1027, 1030 (1969); Buss, *Procedural Due Process for School Discipline,* 119 U. PA. L. REV. 547, 559-562 (1971). This old doctrine, however, is now too transparent to mask the obvious reality, too feeble to bar the Due Process Clause, with its full force, from the public schools.

Clearly, public school administrators *are* State Agents. They act for the government, they are employed by the government, and they are subject to government control. They are *not* parents. With the enactment of compulsory education laws, "to suggest that the parent delegates unrestricted power [to school administrators] especially when he objects to the discipline imposed, is patently absurd." Buss, *Procedural Due Process for School Discipline, supra,* at 560. *See* pages 78-79 below.

Time and again, the Court has recognized that public school officials are not parents for the purposes of the

Constitution. It has recognized that the interests of the public schools and of parents may conflict fundamentally. *E.g., Meyer* v. *Nebraska,* 262 U.S. 390 (1923); *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925). And it has applied the Constitution to limit the actions of public school administrators. *E.g., West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943); *Engel* v. *Vitale,* 370 U.S. 421 (1962).

The Court has not stopped at applying the Constitution to formal regulations of School Boards, but has also applied it, with full force, to discretionary actions of public school principals. Indeed, it has applied the Fourteenth Amendment to disciplinary action by principals—specifically to "suspension" of students. *Tinker* v. *Des Moines Indep. Community School District,* 393 U.S. 503 (1969).

Thus, if anything is sure, it is sure that public school action is ordinary "State action". No fiction alone can keep the Fourteenth Amendment out of the public schools of Columbus.

B.

Children Are Full-Fledged "Persons".

The Fourteenth Amendment protects "persons". It seems obvious that children are "persons". But an age-old tradition was to the contrary. It was long believed that, "like the imbecile, the crazed and the beasts, over . . . children . . . there is no law." [26] This antique philosophy may animate the actions of many public schools. It is however, obnoxious to the Constitution.

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[26] T. Hobbes, LEVIATHAN 257 (Molesworth ed., Vol. 3, 1839-1845).

This Court has spoken in no uncertain terms: "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 U.S. 1, 13 (1967). The Court has specifically affirmed the right of children to Due Process of Law under the Fourteenth Amendment. *E.g., Haley* v. *Ohio*, 332 U.S. 596 (1948); *Gallegos* v. *Colorado*, 370 U.S. 49 (1962); *In re Gault, supra; In re Winship*, 397 U.S. 358 (1970); *McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971). Thus it is too late in the day to read children out of the Due Process Clause.

To be sure, the past decisions recognizing the due process rights of children have arisen in a criminal context, *Haley* v. *Ohio, supra; Gallegos* v. *Colorado, supra*, or a quasi-criminal context, *In re Gault, supra; In re Winship, supra; McKeiver* v. *Pennsylvania, supra*. The present case arises in the context of the public schools. But that makes no initial difference.

The context in which a child asserts due process rights may affect the *nature* of the due process he deserves. *McKeiver* v. *Pennsylvania, supra*. But it cannot affect his right to invoke the Due Process Clause at all. It cannot affect his constitutional status as a "person".

The Court has held that a child's right to free expression, under the First and Fourteenth Amendments, does not disappear in the context of the public schools. *Tinker* v. *Des Moines Indep. Community School District*, 393 U.S. 503 (1969). How, then, could his right to due process disappear? If a child in school is a "person" for purposes of the First and Fourteenth

Amendments,[27] then he is a "person" for purposes of the Fourteenth Amendment alone.

The sole fact that he is a child, moreover, cannot water down the due process to which he is entitled. For the evil addressed by the Due Process Clause threatens him as much as an adult. A child is no more immune to deprivation of liberty or property than an adult. Indeed, he is more vulnerable to such deprivation. He may, in fact, have less liberty. He may have less property. But what he has can be taken away. And it often is. *See Tinker* v. *Des Moines Indep. Community School District, supra.* To protect what he has, he asks to be heard.

The right to be heard is just as important to a child as to an adult. Sometimes, it is suggested that a child's First Amendment rights may be more limited than those of an adult, simply on grounds of age and maturity. *See Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968). Some may think that a child lacks experience needed to participate in the general marketplace of ideas. The Court in *Tinker* rejected this notion. 393 U.S. at 505-507. But, whatever a child's competence to participate in this general marketplace, he surely is competent to speak and be heard in regard to facts about his own conduct, facts which will determine whether he is deprived of liberty or property. He may not know much about the war in Vietnam. But he knows what he did

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[27] "Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State." *Tinker* v. *Des Moines Indep. Community School District, supra*, at 511.

a few hours ago. His interest in the war may be less than that of an adult. But his interest in protecting what is his is the same as that of any other "person".

C.

The Children in Columbus Were "Deprived" of Schooling.

The Due Process Clause applies to "deprivations". The Columbus school children surely were "deprived" of schooling. They were thrown out of school. They were not allowed to attend their classes. They were not allowed to enter their school building. They were not allowed even to get their books. What they had—the opportunity to go to school—was taken away.

To be sure, it was not taken away totally, forever. Some were thrown out of all Columbus day schools forever, but were permitted to go to night school after their "suspension". Some were thrown out of their former school forever, but were permitted to go to another school afterwards. Some were even permitted to return to their former school after the "suspension". *See* pages 13-14 above. They all, however, had a period of up to two weeks of "suspension" in which their opportunity to attend *any* school was taken away completely.

The temporary nature of the "suspension" does not make it any the less a "deprivation" for the purposes of the Due Process Clause. The Court has held that temporary garnishment of wages and temporary replevin of possessions are "deprivations" subject to procedural due process. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 377 (1969); *Fuentes* v. *Shevin*, 407 U.S. 83 (1972). Similarly, it has held that temporary "suspension" of a driver's license is, constitutionally,

a "deprivation". *Bell* v. *Burson*, 402 U.S. 535 (1971). Last Term, the Court simply took it for granted that temporary "sequestration" of possessions is a "deprivation" requiring due process protection. *Mitchell* v. *W. T. Grant Co.*, 42 U.S.L.W. 4671 (1974). "[I]t is now well settled that a temporary, nonfinal deprivation . . . is nonetheless a 'deprivation' in terms of the Fourteenth Amendment." *Fuentes* v. *Shevin*, *supra*, at 85.

The "deprivation" in the present case is even clearer than in the Court's past decisions. First, the time period of the "deprivation" was longer. The Appellees, with one exception, were thrown out of school for at least a full two weeks. But, in the past decisions, the deprivations could last as little as a few days. *Sniadach* v. *Family Finance Corp.*, *supra*, at 343 (Harlan, J., concurring); *Bell* v. *Burson*, *supra*, at 536; *Fuentes* v. *Shevin*, *supra*, at 85; *Mitchell* v. *W. T. Grant Co.*, *supra*, at 4673. The Court had no trouble with this fact. "The Fourteenth Amendment", it said, "draws no bright lines around three-day, or 10-day or 50-day deprivations . . . ." *Fuentes* v. *Shevin*, *supra*, at 85.

Second, the temporary "deprivation" here was more permanent and more total, within its time bounds, than those in past decisions. In the past cases, a person had the opportunity at any time to regain what had been taken from him by posting a bond. *Sniadach* v. *Family Finance Corp.*, *supra*, at 343 (Harlan, J., concurring); *Bell* v. *Burson*, *supra*, at 536; *Fuentes* v. *Shevin*, *supra*, at 85; *Mitchell* v. *W. T. Grant Co.*, *supra*, at 4673. The children in Columbus had no such option to undo a "suspension". Moreover, in the past cases, a person

was compensated later for his temporary loss if it turned out to have been mistaken. *Fuentes* v. *Shevin, supra,* at 73 n.6; *Mitchell* v. *W. T. Grant Co., supra,* at 4676. The children in Columbus could look forward to no such compensation. Whether or not their "suspension" was mistaken, they were not allowed to make up the work they missed and were inevitably given "zeros" for their days out of school.

Third, the temporary "deprivation" here worked other potential "deprivations" beyond the actual period out of school. *See* pages 14-15 above. In the past cases, there was no suggestion that the loss of possessions for a few days would, in itself, do any harm in the future. *Fuentes* v. *Shevin, supra; Mitchell* v. *W. T. Grant Co., supra.* But, here, the record shows that denial of schooling for two weeks may deny a child educational advancement or job opportunities later on.

Thus, if it were not already obvious that the Columbus school children suffered a "deprivation" for purposes of the Due Process Clause, this Court's past decisions make it a foregone conclusion.

D.

The Children in Columbus Were Deprived of an Interest in "Liberty" and "Property".

The Due Process Clause applies only to certain deprivations: deprivations of "life, liberty or property". The school children obviously were not deprived of their lives. But they were deprived of the opportunity to go to public school. This basic opportunity, quite clearly, is an aspect of the "liberty" and "property" protected by the Fourteenth Amendment.

Years ago, in 1961, when the courts first held that deprivation of public education was subject to due process safeguards, the distinction between "rights" and "privileges" was still thought to limit application of the Fourteenth Amendment. The *Dixon* court rejected this distinction, holding that lack of a constitutional "right" to public education was irrelevant to a student's right to due process. *Dixon* v. *Alabama State Board of Education,* 294 F.2d 150, 156 (5th Cir. 1961). This was a great breakthrough at the time. Since then, however, "the Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights." *Board of Regents* v. *Roth,* 408 U.S. 564, 571 (1972). That conceptualistic baffle to due process rights for students is now buried. Strangely, the Appellants in this case seek to resurrect it, with their insistence that public education is not a "fundamental" constitutional right. Brief of Appellants, at 8-16. They seek to apply the law of twenty years ago. One need only say: They are too late.

In place of "right"-"privilege" analysis, the *Dixon* court, thirteen years ago, held that public education is protected by the Due Process Clause because it is "vital and, indeed, basic to civilized society." 294 F.2d at 157. Until recently, other courts followed *Dixon* in this emphasis on the *importance* of a deprivation as the index of its constitutional protection. *See* cases cited on pages 26-28 above. This analysis has led them to worry interminably about distinguishing "important" or "substantial" school "suspensions" from "unimportant" or "insubstantial" ones. But, now, this approach—like that of "right" and "privilege"—has become obsolete.

Weighing the "importance" of an interest "has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process. But, to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." *Board of Regents* v. *Roth, supra,* at 570-571. *See Fuentes* v. *Shevin,* 407 U.S. 67, 88-90 (1972); *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972); *Arnett* v. *Kennedy,* 42 U.S.L.W. 4513, 4530-4531 (Powell, J., concurring), 4534-4536 (White, J., concurring and dissenting), 4522-4524 (Marshall, J., dissenting). Thus, to determine whether the deprivaton of public schooling is subject to procedural due process, the test is "whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." *Morrissey* v. *Brewer, supra,* at 481.

(1) *"Liberty"*. The interests in "liberty" protected by the Due Process Clause are inherently vaguer, more difficult of description, than the "property" interests. This is inevitable. "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Board of Regents* v. *Roth, supra,* at 572. When the Court has sought to give examples of protected "liberty" interests, it made clear that more than "freedom from bodily restraint" is involved and it has mentioned, *inter alia,* the opportunity of an individual "to acquire useful knowledge, to marry, establish a home and bring up children." *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923); *Board of Regents* v. *Roth, supra,* at 572. The opportunity to attend public school must be near the center of this circle of this circle of protected "liberty" interests.

Indeed, that opportunity corresponds to two of the examples of "liberty" interests the Court has already mentioned. For children, public schooling is *the* way "to acquire useful knowledge." For parents, public schooling is essential to "bring up [their] children." One needs little imagination to show that public education—the opportunity that determines all later opportunities—must be one "liberty" protected from arbitrary encroachment by a "Constitution for a free people." A people deprived of education might not long be a free people.

Imagination, however, is not required to reach this conclusion. One can rely on the prior *holdings* of the Court. For the Court has held that the opportunity to learn foreign languages in public school is a protected "liberty" under the Fourteenth Amendment. *Meyer* v. *Nebraska, supra.* If the interest in learning one subject in public school is protected, then so must be the interest in learning *all* subjects. The Court has also held that the opportunity to attend private school is a protected "liberty". *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925). Why not, then, the opportunity to attend public school?

To be sure, the two past decisions involved total deprivation of the "liberties" at stake. The deprivation here is temporary. But, since it is the *nature* of the interest rather than its weight that determines whether the Due Process Clause applies, this distinction makes no difference.

Due Process, no doubt, would require more formal protection against a total deprivation of the "liberty" of public schooling. But it requires *some* protection against temporary deprivations. Liberty would be frail

indeed if it were secure against destruction *in toto*, but could be taken away arbitrarily, piece by piece.

Naturally, the "liberty" covered by the Due Process Clause has limits. It does not include the interest in holding a particular job with a particular employer. *Board of Regents* v. *Roth, supra; Perry* v. *Sindermann*, 408 U.S. 593 (1972); *See Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886 (1961). On the other hand, it does include the interests in finding some job. *Board of Regents* v. *Roth, supra*, at 573-574; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 185 (1951) (Jackson, J., concurring). And "liberty" would be infringed if a person were dismissed from a particular job on the basis of a "charge against him that might seriously damage his standing and associations in the community." *Board of Regents* v. *Roth, supra*, at 573; *see Wieman* v. *Updegraff*, 344 U.S. 183, 191 (1952).

Similarly, in this case, the children's "liberty" might not have been infringed if they had been temporarily moved out of one particular school into another equivalent one. But that is not what happened. They were excluded from *all* schools. And they were excluded on the basis of a charge of misconduct that, the record shows, might well seriously damage their standing and associations with future teachers and fellow pupils. *See* page 15 above. Thus it is clear: the children were deprived of an interest in "liberty" protected by the Due Process Clause.

(2) *"Property"*. "To have a property interest in a benefit, a person . . . must . . . have a legitimate claim of entitlement to it." *Board of Regents* v. *Roth, supra*, at 577. This claim is not created by the Constitution.

Rather, it must arise under "existing rules or understandings that stem from an independent source." *Id.* The source may be a statute setting conditions for entitlement to a benefit, *e.g., Goldberg* v. *Kelly,* 397 U.S. 254 (1970), or conditions for continued entitlement to a job, *Arnett* v. *Kennedy,* 42 U.S.L.W. 4513, 4530 (Powell, J., concurring), 4534-4536 (White, J., concurring and dissenting), 4522-4524 (Marshall, J., dissenting). The source of the 'property" interest may also be a written contract, *Wieman* v. *Updegraff, supra,* or an institutional "guideline", *Perry* v. *Sindermann, supra,* at 599-600, or an unwritten but "mutually explicit" and binding "understanding", *id.* at 600-601. The test is whether there is *some* independent source on which a person may legitimately rely to show that he is *entitled* to a benefit. In this case, the school children could legitimately rely on two such sources to show their entitlement to continued public schooling.

First, they could rely on State statutory law. The Ohio Revised Code obliges local governments to provide a "free education" to all "residents between six and twenty-one years of age." Ohio Rev. Code §§ 3313.48, 3313.64. A duty creates a correlative right. Ohio localities have a duty to provide schooling to children between six and twenty-one years old. Therefore, such children have a right to public schooling. They need make two showings—that they are "residents" of a locality and that they are of the specified age—and they can then establish their statutory entitlement to go to school.

The statutory entitlement to a public education is reinforced by a Code provision that obliges parents to "cause" their children of school age "to attend a

school." Ohio Rev. Code § 3321.03. The only exception is for a child who has "been determined to be incapable of profiting substantially by further instruction." *Id.* The Ohio courts have made clear that "the purpose of . . . this statute regarding compulsory school attendance" is to benefit the child. *State* v. *Gans,* 151 N.E.2d 709, 714 (1958). The goal is to enable the child to realize "his own potential", for without education he "can hardly be expected to realize his potential either to himself or to his community, regardless of his basic natural intelligence." *Id.* at 713-714. Once again, therefore, the statutory duty supports a correlative claim of entitlement to schooling.

Significantly, the Ohio compulsory attendance law seeks to guarantee the child's education "for the full time the school attended is in session, which shall not be for less than thirty-two weeks per school year." Ohio Rev. Code § 3321.04. Thus the child's entitlement is not just to *some* public schooling. It is to public schooling for thirty-two weeks a year. The children in this case were deprived of that schooling for two weeks of the year.

Of course, it is true that Ohio law permits school principals to "suspend" pupils for up to two weeks and does not limit the permissible grounds for "suspension". Ohio Rev. Code § 3313.66. This statutory provision, however, does not dissolve the child's entitlement to schooling. The entitlement is not so easily overcome. And, in any event, the statutory law is only the first source of the entitlement.

Second, in the context of "suspension", a child may also base his claim on the rules of his particular school. The record shows that each public school in Columbus

did adopt rules that stated the types of misconduct for which a pupil might be thrown out of school. *See* page 9 above. These rules limited the discretion of principals. They provided a basis for a legitimate claim that a child had been wrongfully "suspended"—if he violated no rule—and, therefore, that he was entitled to remain in school.

The school rules, at the very least, have the force of the "guidelines" on which a teacher based his claim of job entitlement in *Perry* v. *Sindermann, supra,* at 600. The Court in *Perry* noted that:

> "the respondent claimed legitimate reliance upon guidelines promulgated by the Coordinating Board of the Texas College and University System that provided that a person, like himself, who had been employed as a teacher in the state college and university system for seven years or more has some form of job tenure. Thus, the respondent offered to prove that a teacher with his long period of service at this particular State College had no less a 'property' interest in continued employment than a formally tenured teacher at other colleges, and had no less a procedural due process right to a statement of reasons and a hearing before college officials upon their decision not to retain him."

408 U.S. at 600-601. The Court made clear that " 'property' interests subject to procedural due process protection are not limited by a few rigid, technical forms." *Id.* at 601. Earlier, the Court had noted that "property" interests are created by sources "*such as* State law." *Board of Regents* v. *Roth, supra,* at 577 (emphasis added). Explicit State law, therefore, is one, but only one, possible source of protected "property" interests. If the "guidelines" in *Perry* were

another possible source, then so were the school rules in this case.

The rules may have been vague. But they could not have been more vague than the "sufficient cause" standard held by a majority of the Court, last Term, to create a "property" interest in federal employment. *Arnett* v. *Kennedy, supra,* at 4530 (Powell, J., concurring), 4534-4536 (White, J., concurring and dissenting), 4522-4524 (Marshall, J., dissenting). If a statute "guaranteeing . . . continued employment absent 'cause' for discharge conferred . . . a legitimate claim of entitlement which constituted a 'property' interest," *id.* at 4530 (Powell, J., concurring), then so did the Ohio statutes guaranteeing a child thirty-two weeks of public schooling and the school rules specifying the misconduct that could lead to "suspension".

* * * * * * * * *

Exclusion from public school, therefore, constitutes a "deprivation" of both "liberty" and "property". The lower courts, since 1961, have assumed as much. The law they have evolved—for both "expulsions" and "suspensions"—rests on this assumption. It is now time to make it official, so that the Due Process Clause will not again be totally barred from the public schools.

III. THE BASIC PRINCIPLE OF DUE PROCESS ESTABLISHES THAT THE COLUMBUS "SUSPENSION" PROCEDURE WAS UNCONSTITUTIONAL: THE CHILDREN WERE DENIED THE RIGHT TO BE HEARD

It being settled that the Due Process Clause applies in this case, the remaining question is: Were the "suspended" children in Columbus given the due process the Constitution demands?

To be sure, the answer to this question may require a "weighing" of particular factors involved in school "suspension". *See* pages 54-81 below. But, first, it requires application of the most basic principle of Due Process, a principle that applies in any case and defines the nature of the constitutional guaranty: A person deprived of life, liberty or property must, sometime, have an opportunity to be heard.

"The principles of due process 'come to us from the law of England . . . and their requirement was there designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law.' *Dent* v. *West Virginia*, 129 U.S. 114, 123 (1889)." *Arnett* v. *Kennedy*, 42 U.S.L.W. 4513, 4534 (1974) (White, J., concurring and dissenting). Thus the purpose of Due Process is to secure life, liberty and property against arbitrary deprivation. It is "not only to ensure abstract fair play to the individual. Its purpose, more particularly, is . . . to minimize substantively unfair or mistaken deprivations . . . ." *Fuentes* v. *Shevin*, 407 U.S. 67, 80-81 (1972).

To serve that purpose, Due Process imposes a simple, but absolutely essential, requirement: "The past cases of this Court *uniformly* indicate that *some* kind of hearing is required at *some* time . . . ." *Arnett* v. *Kennedy*, *supra*, at 4534 (White, J., concurring and dissenting) (emphasis added). The "opportunity to be heard" has been at the core of procedural due process from the beginning. *See Baldwin* v. *Hale*, 1 Wall. 223, 233 (1863); *Windsor* v. *McVeigh*, 93 U.S. 274 (1876); *Grannis* v. *Ordean*, 234 U.S. 385 (1914). It has always been held crucial to preventing arbitrary or mistaken deprivations. There is no substitute, because "no better instru-

ment has been devised for arriving at truth than to give a person . . . notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring).

The Columbus "suspension" process collided even with this most basic requirement. The Appellees, the record shows, were not allowed *any* opportunity at *any* time "to be heard." The word of teachers and administrators was the last word. The child had no chance to show that they were mistaken about his conduct or that there were mitigating circumstances. Even after the suspension was over, there was no opportunity to contest its validity.

It was a process that rested on one-sided determination of facts. One view of the facts went unchallenged and untested; the other went unheard. The risk of unfair or mistaken "suspensions", therefore, could not help but be great. "[F]airness [and truth] can rarely be obtained by . . . one-sided determination of facts decisive of rights." *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra,* at 170 (Frankfurter, J., concurring). Consequently, the child's entitlement to schooling was insecure. It was subject, always, to arbitrary deprivation: the very evil that Due Process is meant to combat.

Of course, some children in the class represented by the Appellees were allowed to attend a "conference" after their "suspension" and a "discussion" beforehand. But, the record shows, the facts of the "suspension" were not to be contested at the "conference". And, at the "discussion", although the child might be allowed to speak, there was a flat policy that his version

of the facts was to be disregarded if in conflict with the version presented by a teacher or administrator. *See* page 10 above.

This did not even approach an opportunity "to be heard". It collided with the second essential requirement of Due Process. That requirement is that the hearing mandated by procedural due process must be a fair hearing. It must be conducted "in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965). It is hardly "meaningful" unless the individual not only has the right to speak, but also the right to have what he says *considered.*

The Court has said that "substantively unfair and simply mistaken deprivations . . . can be prevented" when "a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say." *Fuentes* v. *Shevin, supra,* at 81. Obviously, however, mere speaking and listening are not enough. If the State does not fairly consider what it hears, no purpose is served: Words not considered can hardly serve to prevent unfair or mistaken deprivations.

The "discussion" that Columbus principals sometimes held with pupils, then, was not a "hearing" at all. "Suspensions" remained wholly one-sided: Facts were still determined solely on the basis of one version of events. A pupil might present his side; but, if it was in conflict with the charges against him, it would be ignored. He might as well remain silent. If the core requirement of a "meaningful" opportunity to be heard has any meaning, it condemns this hollow form.

The Columbus "suspension" process, therefore, flouted the most basic principle of procedural due pro-

cess. It struck at the very heart of the Due Process guaranty. The Court has *never* permitted such a thing.

The only cases in which the Court has held that there need be *no* meaningful hearing at any time have been cases where *no* "liberty" or "property" interest had been taken away. *E.g., Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886 (1961); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1951); *Ex parte Duncan N. Hennen*, 13 Pet. 225 (1839). *See Arnett* v. *Kennedy, supra*, at 4535 (White, J., concurring and dissenting). In other words, they have been cases in which the Due Process Clause did not apply at all. When—as in this case—it does apply, the requirement of some meaningful hearing at some time has always been enforced.

The law of the Constitution suggests no way in which this requirement may be avoided. (1) In dicta, the Court has indicated that the requirement of a hearing *before* the initial deprivation of a protected interest may extend only to "significant" interests. *Boddie* v. *Connecticut*, 401 U.S. 371, 378-379 (1971); *Fuentes* v. *Shevin, supra*, at 82, 86, or to interests that are not "de minimus", *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 342 (Harlan, J., concurring); *Fuentes* v. *Shevin, supra*, at 90 n.21. But it has never suggested that a vague standard of "significance" or "de minimus" limits the more basic right to a fair hearing at *some* time.

In any event, in the very opinion that included reference to both the "significance" and "de minimus" ideas, the Court held that the interest in possession of an ordinary stereo, for a few days, was neither "insig-

nificant" nor "de minimus". *Fuentes* v. *Shevin, supra,* at 88-90. How, then, could the interest in two weeks of public schooling be "insignificant" or "de minimus"? Indeed, in *Fuentes,* Due Process required a hearing *before* the initial deprivation of the stereo. In a later case, it required a hearing *after* the initial deprivation of a refrigerator and a washing machine. *Mitchell* v. *W. T. Grant Co.,* 42 U.S.L.W. 4671 (1974). In this case, it must require a hearing at some time, before or after the deprivation of public schooling. It would be absurd to suggest that two weeks of public schooling is not at least as worthy of protection as a few days' possession of a stereo or a refrigerator or a washing machine.

(2) It may be that special exigencies of school administration will affect the *form* of hearing to which pupils are entitled. It may be that those exigencies will determine that the hearing, in some situations, be held *after* the initial "suspension". *See* pages 73-75 below. But they cannot obviate the requirement of a hearing at *some* time.

Many times, the Court has faced exigent circumstances that required very prompt action to serve a special governmental need. *E.g., Stochr* v. *Wallace,* 255 U.S. 239 (1921); *Phillips* v. *Commissioner of Internal Revenue,* 283 U.S. 589 (1931); *Fahey* v. *Mallonee,* 332 U.S. 245 (1947); *Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U.S. 594 (1950); *Axtol Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 42 U.S.L.W. 4693 (1974). In these situations, it has allowed the opportunity for a hearing to be postponed. But, in every case, it was held that Due Process required that there be "at *some* stage an opportunity for a hearing."

Ewing v. *Mytinger & Casselberry, Inc., supra,* at 599. Even in "exigent" circumstances, "the opportunity given for [an] ultimate [hearing must be] adequate." *Phillips* v. *Commissioner, supra,* at 597. *See Mitchell* v. *W. T. Grant Co., supra,* at 4675; *Arnett* v. *Kennedy, supra,* at 4537 (White, J., concurring and dissenting).

The Court has held that when property is seized to protect against a bank failure, there must be a hearing at some time. *Fahey* v. *Mallonee,* 332 U.S. 245 (1947). When property is seized to protect the public from misbranded drugs or contaminated food, there must be a hearing at some time. *Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U.S. 594 (1950); *North American Cold Storage Co.* v. *Chicago,* 211 U.S. 306 (1908). Even when property is seized to meet the needs of a war effort, there must be a hearing at some time. *Central Union Trust Co.* v. *Garvan,* 254 U.S. 554, 556 (1921); *Stochr* v. *Wallace,* 255 U.S. 239 (1921). These were "extraordinary situations". *Boddie* v. *Connecticut, supra,* at 379. If the requirement of some hearing was in force then, it must be in force for wholly ordinary "suspensions" from the public schools. If the exigencies of wartime cannot overcome the right to a meaningful hearing, neither can any supposed exigencies in the public schools. Indeed, if the needs of wartime cannot abrogate this most basic requirement of procedural due process, nothing can.

(3) There are two final considerations that sometimes affect Due Process rights. A "weighing" of the interests at stake may affect the *form* or the *timing* of the hearing required by Due Process. *Mitchell* v. *W. T. Grant Co., supra,* at 4672-4674; *Arnett* v. *Kennedy, supra,* at 4531 (Powell, J., concurring), 4537-4541

(White, J., concurring and dissenting). By the same token, an assessment of the inherent trustworthiness of a challenged process may also affect the *form* or the *timing* of a hearing. *Mitchell* v. *W. T. Grant Co., supra,* 4674-4677; *Arnett* v. *Kennedy, supra,* at 4531 (Powell, J., concurring), 4537-4538 (White, J., concurring and dissenting). See pages 56-65 below. But these considerations, once again, are confined to form and timing. They do not affect the basic right to a fair hearing at *some* stage.

This was made clear—if it was not already clear—last Term. The Court upheld the *ex parte* "sequestration" of possessions. It balanced the interests and concluded prompt action was necessary. It also concluded that the "sequestration" process, proceeding through submission of documentary proof of simple facts to a judicial officer, was a trustworthy one. But these conclusions led it to a narrow holding: It held only that there need be no hearing *before* the property was seized. *Mitchell* v. *W. T. Grant Co., supra.* These conclusions did not affect the right to a fair hearing at some time. Indeed, the Court stated flatly that "a hearing must be had" by the time the seizure of property becomes "final." *Id.* at 4675.

Also last Term, certain members of the Court applied these same considerations to determine that a federal employee is not entitled to a hearing before his dismissal. But, there again, they emphasized that the employee had a Due Process right to a full and fair hearing at a later time, before the dismissal became "final." *Arnett* v. *Kennedy, supra,* at 4530-4532 (Powell, J., concurring), 4532-4541 (White, J., concurring and dissenting).

In the present case, the "suspensions" of the children are long since "final." Thus, whatever may be the balance of interests at stake, whatever may be the trustworthiness of the initial "suspension" process, whatever the form and timing of the hearing required by Due Process, a hearing at some time was required. That hearing was never granted to the children in Columbus.

No device—not an idea of "insignificant" or "de minimus" interests, not a doctrine of "exigent" circumstances, not a "weighing" of interests, and not an evaluation of the trustworthiness of the challenged procedure—can undermine the basic principle of Due Process. The simple right to a fair hearing, of some kind at some time, cannot be compromised. If it were, Due Process would mean nothing.

The conclusion cannot be escaped: The Columbus "suspension" procedure, without provision for a fair hearing at any time, is unconstitutional. It is not just *prima facie* unconstitutional. It is simply unconstitutional.

IV. THE REALITIES OF SCHOOL "SUSPENSION" SUPPORT THE DISTRICT COURT'S HOLDING THAT DUE PROCESS REQUIRED A "HEARING PRIOR TO SUSPENSION OR WITHIN A REASONABLE TIME THEREAFTER"

It is settled that Due Process required a "meaningful" hearing at some time for the children "suspended" from the public schools of Columbus. The issues that remain are: At what time were they entitled to a hearing? What form of hearing was mandated by Due Process?

The District Court did not decide the issue of form. It did suggest that an "informal" proceeding, without counsel or trial-type trappings, would satisfy

Due Process.[28] But it did not require any one procedure. There was no need to do so; the unconstitutionality of the "suspension" process was established without addressing the issue. So, the District Court concluded that the "choice of the best procedure for a particular school system should be left [, initially,] to the school officials charged with the administration of that school system."[29] The issue of form, therefore, will not be addressed here.

The issue of timing, however, is more pressing. The District court held that Due Process required a "hearing prior to suspension or within a reasonable time thereafter." Specifically, it indicated that a child must be given a prior hearing, except when there is an immediate need to remove him from the school, due to a threat of major disruption or violence. When immediate removal is necessary, the District indicated, the hearing may not be left until the full period of the "suspension" has gone by; rather, the hearing must be held "not later than 72 hours after the actual removal of the student from school."[30] This resolution of the problem of timing was correct.

Beyond requirement of a "meaningful" hearing at some time, Due Process does not mandate rigid procedures, as to either timing or form, to be applied in every conceivable situation. *See McKeiver* v. *Pennsylvania,* 403 U.S. 528, 543 (1971); *Stanley* v. *Illinois,*

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[28] Other federal courts have held that Due Process requires quite a full adversary hearing for "suspensions" of five or ten days or more, but only an informal hearing for shorter "suspensions." *See* pages 27-28 above. Such a distinction, in terms of the *form* of the required hearing, is not inappropriate.

[29] *Lopez* v. *Williams, supra* note 1, at 1302.

[30] *Id.*

405 U.S. 645, 650 (1972); *Mitchell* v. *W. T. Grant Co.*, 42 U.S.L.W. 4671 (1974). To determine what kind of hearing is required and when, the important considerations are ones of fact. Three aspects of a particular situation must be evaluated: (A) The risk of unfair or mistaken action that is inherent in the situation and the type of hearing needed to reduce the risk. (B) The harm that such action does to the individual. And (C) the extent to which the legitimate purposes of the governmental program in question would be furthered or frustrated by requirement of a prior hearing or a highly formal hearing. *See, e.g., Arnett* v. *Kennedy*, 42 U.S.L.W. 4513, 4530 (Powell, J., concurring), 4532 (White, J., concurring and dissenting) (1974); *Mitchell* v. *W. T. Grant Co.*, supra; *Astol Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 42 U.S.L.W. 4693 (1974).

Therefore, in this case, the timing of the hearing required by Due Process depends on an assessment of the realities of school "suspension". The realities are striking. They support the holding of the District Court. And they show that a fair hearing, before the actual "suspension" whenever possible, is essential to satisfy the purpose of the Due Process Clause.

A.

The Risk of Unfair or Mistaken School "Suspension" Is Truly Extraordinary: It Can Be Reduced Only by Requiring a Prior Hearing Whenever Possible.

There is some risk of unfairness or mistake whenever an official is empowered to deprive a person of life, liberty or property.[31] That is why the Due

[31] Of course, this is particularly true when there is no prior adversary hearing. "When an administrative agency acts on

Process Clause requires not only that there be a hearing conducted "in a meaningful manner," but also that it be held "at a meaningful time." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). "A meaningful time," generally, is *before* a deprivation initially takes place. *E.g., Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 343 (1969) (Harlan, J., concurring); *Boddie* v. *Connecticut*, 401 U.S. 371, 378-379 (1971); *Bell* v. *Burson*, 402 U.S. 535, 532 (1971); *Fuentes* v. *Shevin*, 407 U.S. 67, 80-82 (1972); *Board of Regents* v. *Roth*, 408 U.S. 564, 569-570 (1972). For, if the hearing were not held then, it could hardly reduce the ever-present risk of arbitrary deprivation of protected interests. If it were not held then, it could not serve the purpose of the Due Process Clause: to minimize such deprivations.

There are situations, however, where official safeguards against arbitrary action are very great and very effective. The risk of unfairness and mistake, correspondingly, is low. The Court has held that in such situations a later hearing, before a deprivation becomes "final", will satisfy Due Process. *Mitchell* v. *W. T. Grant Co., supra,* at 4674, 4676-4677. *See Arnett* v. *Kennedy, supra,* at 4531 (Powell, J., concurring), 4538-4539 (White, J., concurring and dissenting). The question is whether the present case falls into this category. It does not.

There are three factors by which to gauge the risk of arbitrariness inherent in a particular situation.

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incomplete information, untested by the adversary process and untempered by an opportunity for deliberation, it is far more likely to err." Freedman, *Summary Action by Administrative Agencies*, 40 U.CHI.L.REV. 1, 27 (1972).

(1) Does the deprivation take place in a relatively cool atmosphere, where any motivation for arbitrary action is slight and relations among the persons involved relatively uncomplicated. (2) What official makes the deprivation decision? Are there safeguards inherent in his office? (3) On what basis does he make the decision? Are there safeguards of requisite proof before he may act? When each of these factors is examined in the context of school "suspensions," it becomes clear that the risk of arbitrariness is extraordinarily great.

(1) The atmosphere in most public schools, as anyone knows, is anything but cool, anything but calm. The physical surroundings, themselves, make the point: "Bells ringing, buzzers sounding, public address systems making all those announcements, thousands of noisy adolescents pushing and shoving their way through crowded halls and stairways, locker doors banging . . . and so on." Bailey, DISRUPTION IN URBAN PUBLIC SECONDARY SCHOOLS 28 (1970). On top of that, in recent years, unrest in public secondary schools has been increasing. *Id.* at 7-12 (describing three major studies of high school unrest). There may be "clashes produced by mixing large numbers of young people and adults who come from very different . . . racial and ethnic strands." *Id.* at 26, 30. And, often, "certain school practices," such as restrictive dress or behavior rules, "can foment dissatisfaction." *Id.* at 26. Administrators and teachers are far from immune to this unsettling atmosphere. In particular, there may be a "serious lack of communication . . . . when older teachers stay on in a school that has become very different in its ethnic and income characteristics." *Id.* at 30.

In this charged atmosphere, arbitrariness inevitably takes root and flourishes. The motivations for arbitrary, even malicious, accusations of misconduct are legion. Outside quarrels may carry over into the school. A student may make a false accusation against a rival; a member of one racial or ethnic group may make a false accusation against a member of another. And, more important, an administrator or teacher, harried and wishing to be rid of certain students, may color ambiguous facts, or simply lie, out of frustration. Administrators and teachers, after all, come from particular ethnic and racial groups as do students; like students, they mix every day with others they find alien or dislike; they, too, often give way to the tension.

The data, showing the extraordinary numbers of minority children "suspended" from school, simply reveal one aspect of the arbitrariness that is the inevitable characteristic of school discipline. *See* Southern Regional Council & Robert F. Kennedy Memorial, THE STUDENT PUSHOUT: VICTIM OF CONTINUED RESISTANCE TO DESEGREGATION (1973); pages 21-23 above. The Ohio school districts reporting to the U.S. Office of Civil Rights, for example, "suspended" only 3.7% of their white pupils, but 7.8% of their minority pupils, in a single school year. The minority children made up 36.4% of their total enrollment; but they accounted for 55.1% of their "suspensions".[32] The inference of arbitrary "suspension" is strong. How many other arbitrary, individual "suspensions" occur cannot be measured. For, if there *never* is a hearing on a "suspension", it can never be shown that the facts did not justify it.

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[32] *See* note 16 above.

The risk of arbitrariness, then, is inherent in the situation. In *Goldberg* v. *Kelly*, 397 U.S. 254, 264 n. 12 (1970), the Court noted the "welfare bureaucracy's difficulties in reaching correct decisions on eligibility." The risk of mistakes there was significant. But it, surely, is greater here. Welfare officials do not live, day-in-day-out, with their clients in an atmosphere of continuing tension. They do not have to make their decisions on the spot, but can return to faraway offices. School administrators and teachers are not so fortunate. The consequent danger of arbitrariness cannot help but be more acute.

The Court has said that *ex parte* decisions made in judicial surroundings bear a low risk of arbitrariness. *Mitchell* v. *W. T. Grant Co., supra,* at 4676. But the courtroom or the judge's chambers is literally worlds away from the heated atmosphere of a public school. In the former context, Due Process may permit delay of a hearing; in the latter context, it may not.

(2) The second factor to consider is the nature of the official—the school administrator—who decides to deprive an individual of a protected interest. Are there safeguards against arbitrariness inherent in his office? The Court has held that there are such safeguards inherent in the office of a judge, and that a judge may be counted upon to minimize the risk of arbitrary action. *Mitchell* v. *W. T. Grant Co., supra,* at 4676. But a school administrator, skilled as he may be, is no judge.

He, plainly, lacks the training in determining credibility, sifting facts for relevance, and assessing the adequacy of proof. That is a judge's job; the principal or assistant principal has other things to do. But, even more important, the school administrator,

unlike a judge, is hardly neutral or detached from the disputes that come before him.

He is intimately involved. Often, as in the cases of several of the Appellees, the administrator is witness, "prosecutor", and "jury", all rolled into one. Inevitably, the students charged with misconduct are individuals he deals with, for better or worse, every day; his evaluation of charges against them will be colored by what he already knows, by positive or negative personal feelings he has about them. By the same token, he is familiar with the teachers or students who make the accusations. He cannot set himself apart from past associations, conflicts, and likes or dislikes, however irrelevant they may be, when he is asked to "suspend" a child.

His "suspension" decisions, moreover, are subject to myriad pressures. He is not only familiar with the teachers and students who come before him. He must continue to work with them. He cannot help but be influenced, in determining the truth of "suspension" charges, by the internal politics" of the school. Teachers, indeed, hold a special power over him. They expect to be "supported" in their accusations against students. If they are not, they will join together to demand "support". The administrator is caught in a bind.

In this institutional context, the school principal or assistant principal is ill equipped to make *ex parte* determinations of fact that are predictably fair and reliable. He may be conscientious. But the risk of arbitrariness is inherent in his office.

What is more, there is no check on arbitrariness. The "suspension" decisions of a school principal are

often invisible. A judge's decisions are subject to public and professional scrutiny. *See Mitchell* v. *W. T. Grant Co., supra.* A federal bureaucrat's decisions are subject to control by superiors. *See Goldberg* v. *Kelly, supra; Arnett* v. *Kennedy, supra.* But principals, typically, are free from public scrutiny and superior control when they "suspend" children. In Columbus, Ohio, the central school authorities reported to the U.S. Office of Civil Rights that they had no information at all on how many students their principals had "suspended" in the 1972-1973 school year.

(3) The inherent risk of arbitrariness depends, finally, on the basis for the deprivation. What is required before it may take place? In some instances, there may be safeguards that will reliably screen out unfair or mistaken deprivations. Here, there were none.

In *Mitchell* v. *W. T. Grant Co., supra,* the Court found several safeguards which, it held, so reduced the risk of arbitrary action that a hearing could be delayed. First, the party seeking a seizure of possessions, in that case, was required by State law to post a bond and was liable in damages if the temporary seizure turned out to be wrongful. *Id.* at 4674, 4676. Second, that party was required to submit to a judge an affidavit stating the "specific facts" that justified the seizure. *Id.* at 4676. Third, the issue involved was "ordinarily uncomplicated", having nothing to do with "fault." *Id.* at 4674, 4676. And, fourth, the issue lent itself to simply "documentary proof" that could be shown to the judge. *Id.* at 4674, 4676-4677. These safeguards, taken together, were thought by the Court to "minimize the risk" of a wrongful deprivation and "corresponding[ly] de-

crease the utility of an adversary hearing which will be immediately available in any event." *Id.* at 4676, 4677.

Similarly, in *Arnett* v. *Kennedy, supra,* Mr. Justice Powell observed that there were safeguards to "minimize the risk of error" in removing a federal employee that permitted postponement of a hearing. He noted that the "employee is provided with 30 days advance written notice of the reasons for his proposed discharge and the materials on which the notice is based. He is accorded the right to respond to the charges both orally and in writing, including the submission of affidavits. . . . After removal, the employee receives a full evidentiary hearing, and is awarded back-pay if reinstated." *Id.* at 4531-4532. *See id.* at 4538-4539 (White, J., concurring and dissenting).

A school "suspension" in Columbus was not subject to these safeguards. There was, of course, no 30 day interval before "suspension", no requirement of a bond or liability in damages if an accusation proved false, and no sworn affidavits. Most important, the truth of the charge typically did not depend on "uncomplicated" issues. It was not subject to simple documentary proof. For, unlike the seizure of property in *Mitchell,* it depended on a determination of "fault."

There was, indeed, nothing to minimize the risk of arbitrary "suspensions", and everything to increase it. There was no strong deterrent to false accusations. In any event, the truth of an accusation would never be finally determined since there was no later hearing. "Suspensions" depended on spur-of-the-moment

charges. They were not clarified, supported or challenged through formal, to say nothing of sworn, statements. The school rules that students were accused of breaking were extremely vague,[33] permitting much leeway for unstructured discretionary application. And the factual issues involved—Did the student "intentionally" break a rule? Was it really *this* student who was seen smoking on school grounds? Who pushed whom first?—were highly complex. But they were resolved hastily and one-sidely.

The only prerequisite, in fact, to a "suspension' in Columbus was the oral accusation. To be sure, a student was sometimes permitted to join a "discussion" of the matter with the principal. But if he protested his innocence, the principal would automatically rely on the word of his accuser.[34] *See* page 10 above. This "discussion" could not screen out any mistakes.[35] And

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[33] The offenses with which the Appellees were charged illustrate the point. *See* page 13 above.

[34] The record shows that this was true if the accuser was a teacher; but the record is silent on whether the principal held a "discussion" at all when the accuser was another student.

[35] To be sure, when the Court has held that Due Process requires a prior hearing, it has often said that the hearing could be informal and limited to the "probable validity" of an initial deprivation. *E.g., Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 343 (Harlan, J., concurring); *Bell* v. *Burson*, 402 U.S. 535, 542 (1971); *Fuentes* v. *Shevin*, 407 U.S. 67, 97 (1972); *Morrissey* v. *Brewer*, 408 U.S. 471, 485-486 (1972). But the "discussion" at issue here was *not* such a prior hearing. In each of the past decisions requiring a hearing on "probable validity," the Court required that both sides be allowed to contest the question of "probable validity" and that the decisionmaker *consider* what *both* sides said. That was not done by the Columbus principals. Moreover, the "probable validity" hearings required in the past have always been preliminary to a full, later hearing, at which

there was nothing that could. The child was not just guilty as accused, he was guilty *because* he was accused.

Surely, then, this "suspension" process had none of those characteristics, reducing risks of arbitrary action, that have led the Court, in some cases, to permit delay of a fair hearing. The risks could be reduced, and the purpose of the Due Process Clause served, only by holding a fair hearing before "suspension".

B.

A Mistaken "Suspension" Does Serious Harm to the Child: It Can Be Prevented Only by Opportunity for a Prior Hearing.

Just as the risk of arbitrary "suspension" was great, so was the harm it inflicted on the children. It was a harm that could be avoided only by provision of a prior hearing. This is the second general consideration in the weighing of interests to determine whether Due Process mandates such a hearing.

The collateral harms of an arbitrary "suspension" are great by themselves. The record and briefs[36] are replete with description of the psychological cost imposed by such a "suspension" on a child. *See* page 15 above. If a child is in fact "innocent" and had no opportunity to prove it, he will be bewildered, frustrated and angry; fellow students and teachers will see

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the individual would be fully compensated for the temporary deprivation if it turned out to have been wrongful. That opportunity, also, was denied by the Columbus school officials. *See* note 43 *infra*.

[36] Brief of Appellees, at 33-34; Brief *Amicus Curiae* of National Association for the Advancement of Colored People *et al.*, at 10-14. The District Court's Findings of Fact include six clear psychological harms worked by arbitrary school "suspensions." *Lopez* v. *Williams*, *supra* note 1, at 1292.

him as a "troublemaker"; he, himself, may even come to accept that role.[37] Perhaps such consequences are too evanescent to achieve the status of a dollar bill under the Due Process Clause. Even an adult federal employee wrongfully discharged from his job, *see Arnett* v. *Kennedy, supra,* must feel frustration. But psychological harms should not be ignored here, because the individuals involved are not adults, but children, for whom such harms are magnified tenfold.

More tangible collateral harms are also amply illustrated in the record and briefs.[38] The permanent record kept of "suspension" is a time bomb that can explode to harm the child at unexpected times, in unexpected places. It is always available to the police. It is used in preparing teachers' recommendations of the child for jobs or higher education. *See* page 15 above. Again, these harms are speculative.[39] A discharged federal employee, too, must live with potentially harmful stigma of his discharge. But, once more, this case involves children. More opportuni-

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[37] In theory, a "suspended" child is sent home. In fact, if his parents work, he is sent out on the streets. There, feeling resentful and idle, he may well drift into delinquency.

Moreover, whether at home or on the street, the child labelled a "troublemaker" may well be reinforced in any tendencies he has to assume that role. *See* page 15 above.

[38] Brief of Appellees, at 34-38; Brief *Amicus Curiae* of National Association for the Advancement of Colored People *et al.*, at 15-16; Brief *Amicus Curiae* of National Committee for Citizens in Education *et al.*, at 18-20.

[39] The school authorities of Columbus, however, apparently believe that there are serious harms that do result from the record of "suspension". Why else would they have provided, in July 1973, that, in the future, all record of "suspensions" found to have been mistaken should be expunged? *See* pages 7-8 above.

ties are open to them; and more can be closed by the recorded label of "troublemaker".

While the collateral harms of "suspension", therefore, are serious, the crux of this case is the immediate harm done to the child: the exclusion from school for one or two weeks and the transfer to another school, or to a night school, that often follow. Each day of "suspension" earns the child a "zero". Each day's classes cover work that the child is not allowed to make up. The cumulative learning process in which one day's class builds on the day before is interrupted. The child is excluded from the only stable social setting he knows, other than his family. And, if his "suspension" serves as a predicate for transfer to another school, these harms are exacerbated.

To be sure, the harm might be greater if he were "expelled".[40] But one week of "suspension" is 6% of a school semester in Ohio; two weeks of "suspension" amount to 12% of the semester.[41] If snow were to close the schools for two weeks, would not the school authorities add on two weeks at the end of the school year to make up what was lost? If teachers went on strike for even one week, would not the

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[40] In fact, "suspensions" for a week or two have a way of expanding in duration, as they did in the cases of two of the Appellees. *See* page 13 above. Moreover, available data show that, in a single school year 39% of children "suspended" at least once were, actually, "suspended" twice, and 25% were "suspended" three or more times. *See* page 24 above. As the number of weeks lost mounts, the distinction between a "suspension" and an "expulsion" disappears.

[41] This calculation is based on the requirement in Ohio of a minimum school year of thirty-two weeks. Ohio Rev. Code § 3321.04.

authorities go to court, seeking a preliminary injunction on the ground that "irreparable harm" to education was being done? If the State of Ohio believes that school attendance for a full thirty-two week year is not of vital importance, then why has it made that attendance compulsory?[42]

Of course, precise measurement of the educational harm done by a "suspension" is impossible. If a child is "suspended" on the day of an important test or a particularly important class, the "suspension" even for one day might affect his grades for the year. In other circumstances, or for other individual students, no clear effect on grades will be observed. But Ohio's compulsory attendance law does not permit a child to leave school for one or two weeks simply on a showing that his grades would not be affected. By the same token, Due Process rights cannot depend on B-pluses and C-minuses.

What is important, for the purposes of the Due Process Clause, is that it is public schooling at stake. Schooling is the most important interest that a child has, besides the care of his family. Deprivation of schooling does not affect his present income, *see Sniadach* v. *Family Finance Corp., supra; Goldberg* v. *Kelly, supra; Arnett* v. *Kennedy, supra,* but it does affect his present intellectual and emotional growth. It does not affect his ability to drive a car or move around the country, *see Bell* v. *Burson, supra,* but it will affect his ability to move up through society. Education touches not only a child's interests in "property", but also in "liberty".

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[42] *Id.*

The Court has held that a few days' possession of a stereo was important enough to support a claim for a prior hearing. *Fuentes* v. *Shevin, supra.* This holding has been limited, but explicitly not overruled. *Mitchell* v. *W. T. Grant Co., supra.* Surely, if deprivation of a stereo for a few days must be preceded by a hearing, so must deprivation of schooling for two weeks.

Unlike a job, *Arnett* v. *Kennedy, supra,* or a stereo, *Fuentes* v. *Shevin, supra,* or a refrigerator, *Mitchell* v. *W. T. Grant Co., supra,* schooling lost cannot be quickly replaced. When a child is "suspended" from one school he cannot go out and find another one. Nor can he post a bond, *Sniadach* v. *Family Finance Corp., supra,* at 343 (Harlan, J., concurring); *Bell* v. *Burson, supra,* at 536; *Fuentes* v. *Shevin, supra,* at 85; *Mitchell* v. *W. T. Grant Co., supra,* at 4673, and undo his "suspension".

It is plain that only a prior hearing can avoid all of the harms worked by an arbitrary school "suspension". A later hearing could allow the child to enjoy a sense of bitter vindication. It could restore his standing in the school. It could result in expungement of official records of his "suspension" or in an order that he be allowed to make up work he missed. And, if held promptly while the child is still out of school, it could reduce his period of "suspension". These possible remedies—which, of course, were not provided by the Columbus school authorities—are significant and show the importance of requiring a hearing at *some* time. But they cannot undo the child's humiliation or his absence from the classroom learning process for several days. Even if there were provision for

damages, the child could not be made whole for his educational loss.

Schooling is not like a property interest whose only function is to produce income or immediate enjoyment. Temporary loss of an income-producing asset can be compensated later by a damage award. *See, e.g., Arnett* v. *Kennedy, supra; Astol Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 42 U.S.L.W. 4693 (1974). Temporary loss of enjoyment of household possessions can also be compensated by damages. *See, e.g., Mitchell* v. *W. T. Grant Co., supra.* But temporary loss of schooling, a cumulative learning process, cannot later be fully compensated, for the time has past and the damage has been done. [43]

C.

The Legitimate Goals of the Public Schools Would Not Be Frustrated by Requirement of a Minimally Fair Hearing Before, or Promptly After, "Suspension": To the Contrary, Those Goals Would Be Promoted by Such a Requirement.

The risk of arbitrary "suspension" is great. The resulting harm is serious. Only a prior hearing can reduce the risk and the harm. It remains only to determine the impact of such a hearing on the operation of the public schools.

Of course, the schools have an urgent need for discipline. Discipline is not the primary purpose of public education—that purpose, in the words of the Ohio courts, is to enable children to "realize their potential" [44]—but it is necessary, to a degree, if the pri-

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[43] For this reason, the prior hearing required by Due Process should not be limited only to the "probable validity" of the "suspension." *See* note 35 *supra.*

[44] *E.g., State* v. *Gans*, 151 N.E.2d 709, 713-714 (1958).

mary purpose is to be fulfilled. The power of public schools to discipline their students is not at issue here. What is at issue is (1) whether any purpose is served by unfair or mistaken "suspensions", and (2) whether requirement of a prior hearing to screen out arbitrary "suspensions" would seriously impede other school functions.

(1) The harm to be prevented by a prior hearing is simply the imposition of *unfair* or *mistaken* "suspensions". The question is whether those particular "suspensions" promote any legitimate school goal. They do not.

The purposes of discipline are not served by punishing an innocent person. A child subjected to an unfair or mistaken "suspension" learns nothing about obedience to school rules—unless he learns that the rules are meaningless in application. He learns no respect for those in authority. Frustrated and angry, he may *become* the "troublemaker" that school officials believe him to be. Discipline suffers.

Eventually, arbitrary "suspensions" will be widely recognized to be arbitrary. Any deterrence they may have achieved will crumble. For once "law and order" is perceived to be unfair, order breaks down. Charles Silberman has written that careless punishment in the schools "serves only to breed more defiance and destruction, which breeds more repression . . . especially when accompanied by . . . arbitrariness, racial prejudice, assumption of student guilt and general disregard of individual rights." Silberman, CRISIS IN THE CLASSROOM 340 (1970).

Arbitrary "suspensions" not only fail to serve a disciplinary purpose. They *dis*serve that purpose.

School administrators, therefore, have an interest in preventing them that runs parallel to the interest of their victims.

But there is more to it than that. "Suspensions" that are unfair or mistaken also *dis*serve a school purpose more fundamental than discipline. That is the purpose of educating children. The State law of Ohio obliges the schools to provide a free education to children who are "residents between six and twenty-one years of age." Ohio Rev. Code §§ 3313.48, 3313.64. And it mandates a thirty-two week school year. Ohio Rev. Code § 3321.04. When the schools arbitrarily remove such children from school, they undercut their own reason for existence.

Once the government establishes a program of welfare or paroles, the Court has said, it has an interest in ensuring that all eligible individuals benefit under the program. A hearing before termination of the benefit, the Court has held, promotes that governmental interest. *Goldberg* v. *Kelly, supra,* at 264-265; *Morrissey* v. *Brewer, supra,* at 483-484. Similarly, once the State establishes a system of public education, it has an interest in ensuring that all eligible children receive that education. A hearing before children are removed from school promotes that interest.

(2) But would a prior hearing, in and of itself, seriously impede school operations? It is sometimes suggested that such a hearing would (a) take time in which disruption could continue, (b) undermine the authority of school administrators, (c) break down the "parental" relationship between administrators and students, and (d) take teachers and administrators away from their educational duties. The latter three

arguments are plainly insufficient to obviate the Due Process requirement of a prior hearing. The first is sufficient only to qualify that requirement, not eliminate it.

(a) The District Court, in this case, did *not* hold that Due Process demands a prior hearing in *every* case of "suspension". Rather, it recognized that "immediate removal of a student" might be necessary in particular situations where the student would continue to disrupt the academic atmosphere, or endanger persons, or damage property.[45] This rule, if interpreted narrowly, is proper and eliminates any danger that could be created by a prior hearing.

In truly exigent and "extraordinary" situations, requiring prompt action, Due Process has traditionally permitted a hearing to be delayed. *E.g., Fahey* v. *Mallonee,* 332 U.S. 245 (1947); *Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U.S. 594 (1950); *Astol Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 42 U.S.L.W. 4693 (1974). *See Boddie* v. *Connecticut,* 401 U.S. 371, 379 (1971). An imminent threat of continued disruption or physical violence in a public school would seem to justify delay of a hearing under this principle. But the threat must be genuinely imminent, and the threatened disruption substantial, if the principle is not to be abused and the purpose of procedural due process frustrated. Such emergency situations do exist. But they are truly "extraordinary".

It may be that some of the Appellees were "suspended" in circumstances that would have permitted delay of a hearing. But most were not. Two of them

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[45] *Lopez* v. *Williams, supra* note 1, at 1302.

were notified of their "suspension" after they had been allowed to finish the day and go home. (App. 128-129, 133.) They, apparently, had not presented any imminent threat. One was "suspended" after asking if she could leave school during the day. (App. 138-139). This was no threat to disrupt school operations.

Of course, these "suspensions" occurred at a time of confrontations and demonstrations in the schools. That fact might have permitted some hearings to be delayed. However, the record shows that when one fortunate student appeared with a lawyer in the middle of the demonstration, the principal was able to hold a hearing:

> "A. . . . We had one student, Mr. William C. Harris, and Ms. William Harris and their attorney came in. This was in about ten minutes of this incident. We had a hearing for this particular case, at that time.
>
> Q. Was that an unusual sort of procedure? A. I would say that was unusual when someone comes in with an attorney, yes, this is unusual."

(App. 101.) And, in cases of the Appellees, hearings were not simply delayed. They were *never* held.

More importantly, the cases of these particular Appellees are not the only ones at issue here. This is a class action. The members of the class are all children "suspended" from the Columbus public schools over a two-and-one-half year period. Most of them were not "suspended" at a time of confrontation. They were "suspended" in normal times.

In normal times, the rule of exigency will not usually apply. The many children who are "suspended" for

non-aggressive actions—such as smoking, drinking, dress code violations, tardiness, truancy or simply "goofing off"—are unlikely to create any disruption while they await a hearing. And the children "suspended" for more aggressive acts—such as fighting, swearing, "talking back" to a teacher, or throwing spit balls—are usually unlikely to remain aggressive once they are brought to the principal's office for a hearing.[46] Obviously, the countless children who are "suspended" arbitrarily, on the basis of unfair or mistaken accusations, pose no threat at all. Normally, then, there is time for a hearing without serious fear of trouble.

Clearly, this was the case in Columbus. The record indicates that principals usually held a "discussion" with students before "suspension". This "discussion", of course, was a hollow form. *See* pages 10 and 49 above. But, if there was no threatened disruption to delay the bogue "discussion", then there was none to justify delay of a fair hearing.

Finally, it should be plain that even in exigent circumstances where no prior hearing is held, a *prompt* hearing is still possible. A "cooling off" period may be justified. But to wait the full two weeks of a "suspension" is not justified. A day or two—the District Court suggested 72 hours—is more than enough time to "cool off," and then hold a fair hearing while the "suspension" can, at least, be reduced if found to be mistaken.

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[46] The survey of more than 8,000 households conducted by the Children's Defense Fund, *supra* note 24, revealed that of all the children in those households who had been "suspended" from school less than 40% had been charged with even minimally violent behavior, such as fighting or destruction of property.

(b) Nonetheless, it is sometimes suggested that holding hearings will undermine the authority of school administrators: It will allow their commands to be questioned; it will show that they often make mistakes; and it will make them more reluctant to "suspend" any children. These purported effects of a hearing requirement are hardly very weighty in the scales of the Due Process Clause.

A principal must have authority, to be sure. But he is not meant to be a dictator. "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students." *Tinker* v. *Des Moines Indep. Community School District,* 339 U.S. 503, 511 (1969). That a principal's commands will be questioned, and that he will be shown to be fallible, then, are not events to be feared. They are inevitable facts of life under a Constitution that treats children "in school as well as out of school" as persons "possessed of fundamental rights which the State must respect." *Id.*

Requirement of a "suspension" hearing, in any event, will not greatly reduce the principal's power. The hearing will affect only the determination of facts, the determination that a student did violate a school rule. The principal will retain his discretionary power to act as he thinks best once a violation is established. "A simple factual hearing will not interfere with [this] exercise of discretion." *Morrissey* v. *Brewer, supra,* at 483.

Nor will a hearing requirement seriously undermine the principal's position in his school. At first, when the federal courts required schools to hold hearings,

the reaction was shock and dismay; anarchy seemed around the corner. But, now, many schools have experience with "suspension" hearings. They have found that fair procedures actually increase respect for authority. One principal has written that "when due process is followed . . . [t]he operation of the school can be greatly enhanced rather than disrupted or impeded." DeBruin, *Education and Due Process,* 90 EDUCATION 174, 182 (1969). Another has predicted that "[a]dministrators and teachers will come to learn that due process will strengthen, not weaken, their positions within their school and community." Ferguson, *Due Process—Is Now,* 57 NASSP BULL. 95, 99 (1973). This is to be expected. For the "moral authority of a conclusion [such as a "suspension"] largely depends on the mode by which it is reached. . . . No better instrument than due process has been found for generating the feeling . . . that justice has been done." *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring).

It may be that requirement of a hearing will cause principals to "suspend" fewer children. Certainly, it will screen out "suspensions" that are demonstrably unfair or mistaken. But that will be a gain, not a loss, for the public schools. *See* pages 71-72 above. Just as certainly, if other "suspensions" are really necessary to school discipline, hearings will not stop them. So long as a principal has convincing evidence that a student broke a school rule, he can remove the student after a hearing just as he did without one.

Perhaps, also, a hearing requirement will cut down on "suspensions" in more marginal cases. In view of the shocking number of children now being thrown

out of school every year, however, it would be valuable all around for principals to think twice before imposing this extreme sanction. *See* pages 19-24 above. There are many disciplinary measures short of "suspension". In the last few years, public schools have begun to develop such alternatives. One principal recently told a conference of secondary school principals that he re-examined the use of "suspensions" in his school and determined that they were unnecessary in most cases. "In some cases," he said, "we realized that out-of-school suspensions would be needed; for example, in situations where hot tempers as a result of a fight required cool-off time away from school." But, for the other cases, he set up an "in-school suspension center" where students could continue their studies. "Students respect it," he concluded, "and it has cut down on many kinds of disciplinary problems in the school." Johnson, *Student Disciplinary Codes—What Makes Them Tick*, Speech Delivered to Annual Conference of the National Association of Secondary School Principals, February 2-7, 1973, at 4.

(c) If reduction of principals' authority, therefore, is no serious problem, there is still the common suggestion that "suspension" hearings will break down the close "family" relationship between school officials and students. To be sure, a hearing, setting accusers on one side and students on the other, may seem inconsistent with a "family" relationship. But, in plain fact, the public school is *not* a "family".

"In the modern school setting," with hundreds of students, administrators and teachers do "not and perhaps cannot have an individual, parent-like concern for a child's welfare." Buss, *Procedural Due Process for School Discipline*, 119 U.Pa.L.Rev. 547, 560 (1971).

It is particularly inappropriate to speak of a "family" relationship when the purpose is to throw a child out of school. Real parents cannot take any such action. A "suspension", after all, temporarily severs the very relationship that procedure without a hearing is said to preserve.

School officials may argue that "suspension" sometimes is in the best interests of the child. But the child, and his parents, have every right to disagree. If the parties stand at arms length, if there is a conflict of interests, it is inherent in the situation; it is not caused by any hearing requirement.

A relationship of mutual respect and trust, of course, is important in the public schools. But a hearing requirement will build such a relationship, not destroy it. Neither respect nor trust is fostered by one-sided decisionmaking so crucial to the child. One school administrator has written, "[suspensions] do not need to become wellsprings of discord or bitterness. By ensuring that [they] take place in accordance with due process and for specific serious acts, school [officials] will earn trust as they perform this important quasi-judicial function." Winston, *Expulsions and Due Process*, 54 PHI DELTA KAPPA 699 (1973).

(d) The final argument sometimes offered to oppose "suspension" hearings is that they will take time away from the educational functions of administrators and teachers. Hearings, of course, will take some time, but they need not take inordinate time. And what they do take will be time well spent.

The District Court, in this case, did not require "suspension" hearings to follow formal trial-type procedures. They may be quite informal and still be fair.

They may need to take no longer than an hour or so, in most cases. They may be held in the afternoon, after class hours, to avoid interference with the normal school day. The principal may appoint a special assistant, more insulated from the internal "political" pressures of the school, to preside at the hearings, and thereby free himself of the burden. He may opt for less drastic alternatives to "suspension". See page 78 above, in some cases to reduce the number of hearings necessary. The school, in other words, "is not without weapons to minimize" the cost of the hearings. *See Goldberg* v. *Kelly, supra,* at 266.

The process might seem inefficient, if the test of efficiency is removing as many children as quickly as possible from the school building. But, in the public school context, efficiency is measured not just in time and numbers, but also in fairness, good will and trust. Most important, efficiency is hardly served by countless mistaken "suspensions". An investment in hearings is an investment in reliable decisionmaking on a matter that touches the core of the public school's function. *See* page 72 above.

The time taken for hearings will not be taken *from* an educational function. It will be taken *for* an educational function. School officials would not "suspend" a student if they did not think it would serve a school purpose; thus, resources expended on "suspensions" are not unconnected to the school's "education." But, more fundamentally, the hearings themselves will "educate." A Policy Statement on Discipline issued by the Columbus Public School System proclaims "a responsibility to teach proper behavior patterns . . . necessary in a democratic society." (App. 55.) One of those

"behavior patterns" is embodied in the process of a fair hearing.

Time and again, the arguments of cost-saving and time-saving have been raised against enforcement of Due Process rights. Inevitably, a hearing takes an official away from other tasks. But, if the official has the time to deprive a person of liberty or property, he must take the time to do it fairly and carefully. Again and again, the Court has held that "the Constitution recognizes higher values than speed and efficiency." *Stanley* v. *Illinois*, 405 U.S. 645, 656 (1972). *See, e.g., Goldberg* v. *Kelly, supra; Morrissey* v. *Brewer, supra.*

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Thus, the District Court's holding that Due Process requires a "hearing prior to suspension or within a reasonable time thereafter" creates no horrible problems for the public schools. In fact, the hearing requirement will promote, rather than impede, legitimate school functions. When this State interest in the requirement is added to the fact that the present risk of arbitrariness is great and the resulting harm to individual children very serious, it is plain that the realities of school "suspensions", weighed in the balance, support the holding of the District Court.

V. AFFIRMANCE OF THE DISTRICT COURT'S HOLDING WILL NOT LEAD DOWN ANY SLIPPERY SLOPE

It is established that Due Process requires a fair hearing before, or promptly after, "suspension" of a child from public school. It is a short step—if a step at all—to the conclusion that this Court should, therefore, affirm the judgment of the District Court in this case. Yet there may be lingering doubts about the implications of such an affirmance: Should the Court

"become involved" in the administration of the public schools? Will a right to a hearing before "suspension" lead to hearings about all and sundry types of disciplinary sanctions in the schools?

A short answer to the first question is: It is not the Court, but the Constitution, that is "involved" when a public school treads on the fundamental rights of school children. The Court does not decide to tell school administrators what to do. It interprets the Constitution. The administrators, too, are capable of interpreting the Constitution's commands; and if they obey them, there need be no occasion by intervention by any court.

A somewhat longer answer to the question is: This Court has long been "involved" when public schools deny constitutional rights. It has reviewed the decisions of school authorities on what courses they will teach, *Meyer* v. *Nebraska,* 262 U.S. 390 (1923), what subjects may be mentioned in the courses, *Epperson* v. *Alabama,* 393 U.S. 97 (1968), what religious observances they will conduct, *e.g., Engel* v. *Vitale,* 370 U.S. 421 (1962), what patriotic observances they will require, *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943), and what sorts of "disruptive" conduct they may punish, *Tinker* v. *Des Moines Indep. Community School District,* 393 U.S. 503 (1969).

To be sure, school officials have a broad discretionary authority that should not be too tightly constricted. But, already, the Court has reviewed the most particularized discretionary decisions by individual school principals in the context of the First and Fourteenth Amendments. *Tinker* v. *Des Moines Indep. Community School District, supra. See Healy* v. *James,* 408 U.S.

169 (1972). Here, the Court is asked to do no such thing. Rather, under the Due Process Clause, it is asked to review a broad statutory and regulatory policy and city-wide administrative practices in the Columbus schools. No individualized discretionary decision is at issue.

School authorities, Mr. Justice Jackson wrote for the Court, "have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia State Board of Education* v. *Barnette, supra,* at 637. What is at stake in this case is whether youth will be taught "to discount" the principle of procedural fairness as a "mere platitude." Any hesitation to review school officials' actions, to resolve such a basic issue, should be quickly put aside. The Court has acted in the past. It should act now.

There should not be concern that a Due Process requirement of hearings on "suspensions" will lead, willy-nilly, to requirement of hearings on every conceivable disciplinary decision by school principals. Horribles are often paraded down slippery slopes for the purposes of argument; but, in fact, this Court is quite able to draw lines that conform to constitutional purposes. *See, e.g., Kirby* v. *Illinois,* 406 U.S. 682 (1972); *United States* v. *Kras,* 409 U.S. 434 (1973).

The issue in this case is limited to one extreme type of school punishment: *exclusion* from the school. "Sus-

pension" means deprivation of education, deprivation of an interest in "liberty" and "property". In-school punishments, on the other hand, need not work a deprivation of education. *See* page 78 above. The distinction is a clear one. It can be maintained. Other disciplinary sanctions, such as corporal punishment, may raise other problems under other constitutional provisions. But the affirmance of the District Court's Due Process holding here can be easily confined.

VI. CONCLUSION

For a case whose outcome will affect the lives of tens of thousands of children across the Nation, the issue here is remarkably simple. The children ask to be heard when the State deprives them of the one interest, besides their family, that means the most to them. They ask only that the allegations, underlying the deprivation, be tested through the most traditional process in Anglo-American law: a fair hearing. Here, as so often, the simplest issues are the most important.

The law of the Due Process Clause is almost as simple as the issue it must resolve. An interest in liberty and property is at stake. Therefore, there must be an opportunity for a fair hearing. The law is so clear that one marvels at the controversy that has surrounded it.

Yet controversy there is. The Appellants would have this Court hold that public education is an interest not protected whatsoever by the Due Process Clause. They would, thereby, tear down a thriving body of doctrine that has evolved, over ten years, in the lower courts. Amidst the ruins, many public schools that have sought to follow court rulings and develop fair procedures would be left to return to the old ways. The public schools that resist any change would be given the impri-

matur of this Court to continue the casual, no doubt careless, removal of children from the classroom.

It has taken time to bring the most ancient of procedural rights into the public schools. But progress has been made. Increasingly, school officials are adopting due process into their administrative curriculum. "It seems surprising", one principal wrote, "that we of the public schools, responsible for the education and development of young people, would have [had] to be told by the courts that young people are individuals—individuals with basic human rights. The developing philosophy in education for years has been to treat and teach students as individuals. The courts [have] recogniz[ed] and support[ed] this philosophy."[47] It would be a sad day indeed, if this court were now to scrap all of this progress, to hold that young people are not individuals with basic human rights once they enter the school building.

We urge the Court to put its hand to the task long undertaken by the lower courts, now joined by many school officials, that promises, one day, to assure children the fundamental fairness that is their birthright. We urge that the judgment of the District Court be affirmed.

Respectfully submitted,

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[47] Ritchie, *Due Process and the Principal*, 54 PHI DELTA KAPPA 697, 698 (1973).